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JAMES H. McKENNE

Supreme Court of the United States.

OCTOBER TERM, 1903. No. 433.

THE STATE OF MINNESOTA,
Appellant,

vs.

NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY and JAMES J. HILL, as President of the Northern Securities Company, and Individually,

Appellees.

BRIEF FOR THE APPELLEES.

The Northern Securities Company, herein called the Securities Co., is an investment and financial company, whose articles of incorporation under the laws of the state of New Jersey are set out in paragraph I of the bill of complaint; the Great Northern Railway Company, herein called the Great Northern Co., and the Northern Pacific Railway Company, herein called the Northern Pacific Co., are railway com-

panies, the former chartered by Minnesota, the latter by Wisconsin, each of them operating a line of railway from Lake Superior and also from St. Paul, Minnesota, to Puget Sound, and competing to some extent with each other for domestic and also for interstate traffic.

The Securities Co. has acquired a majority of the shares of each of the two railway companies, and this ownership of shares, and the manner in which the ownership was acquired, constitute the basis of the bill of complaint.

The Pleadings.

The bill alleges in paragraph XI that the Securities Co. was incorporated pursuant to an agreement between the defendant James J. Hill and other officers and shareholders of the Great Northern Co., controlling a majority of the capital stock, acting for themselves and for the railway company with its knowledge and consent, and in collusion with officers and stockholders of the Northern Pacific Co., among them J. Pierpont Morgan, who owned and controlled a majority of the shares of the Northern Pacific Co., and who were acting for themselves and the company with its knowledge and consent; and further alleges that the Securities Co. was incorporated under such agreement solely as an instrumentality by means of which the stock, property and franchises of the two railway companies should be consolidated in effect if not in form, and the management of their business, including the fixing of rates and charges for passenger and freight transportation over all their lines, as well within as without the state of Minnesota, should be vested in and controlled by the Securities Co., and all competition between the

two railways, as well within as without the state of Minnesota, should be suppressed and removed, and by means of which the promoters and organizers of the Securities Co. intended and sought to evade and violate the laws of Minnesota prohibiting the consolidation of competing railways, and the laws of that state prohibiting all combinations in restraint of commerce or trade within the state of Minnesota or between the people of this state and those of other states and countries.

In paragraph XII the bill alleges that to carry out and accomplish such purposes and to effect a combination of the two systems, as well within as without the state, and to suppress all competition between them, it was agreed that the Securities Co. should be organized with a capital stock equal to that of the Great Northern Co. at a valuation of $180 per share plus that of the Northern Pacific Co. at a valuation of $115 per share, and that its stock should be exchanged for the shares of the railway companies at these valuations and without other consideration, and that more effectually to carry out these purposes, they caused the preferred stock of the Northern Pacific Co. to be retired by proceedings stated at much length in the bill.

In paragraph XV it is alleged that the Securities Co. has acquired, by the exchange of its own stock therefor, upwards of 90 per cent of the stock of the Northern Pacific Co. and upwards of 75 per cent of the stock of the Great Northern Co.; and that the sole purpose, object and effect of such acquisition of stock by the Securities Co. was and is to transfer to it the complete management and control of the railway lines within and without the state of Minnesota; and to

place the complete management of them and the power to dictate the policy of each railway and fix the rates of transportation on freight and passengers, within the state of Minnesota as well as without said state, in the hands of one party or board of directors; and to enable a single body of men, acting as the board of directors of the Securities Co., to fix the rates and charges on both railways and determine what trains should be operated over any of their lines, remove all competition, and prevent the building of lines into new territory; and to create and perpetuate a monopoly in railway traffic in northern Minnesota and elsewhere. That the agreement and its consummation are in restraint of trade, tend to create a monopoly in railway traffic, and are against public policy and void.

In the same paragraph XV it is also charged that the holders of a large majority of the stock as well as the officers and directors of each railway company had knowledge of and consented to the carrying out of the agreement complained of.

In paragraph XVI it is charged that since December, 1901, the Securities Co. has been and now is directing and managing the business of both railway companies and is determining and enforcing passenger and freight rates on their lines of railway, together with the manner and means of handling business and the earnings of the companies, and will continue to do so unless enjoined.

In paragraph XVII it is alleged that the Securities Co. never had any property or assets except those acquired by the exchange of its capital stock for that of the railway companies; and that it was organized solely and exclusively to take over by exchange, without other consideration, all the capital stock of each rail-

way company and its earnings, and by this device to substitute for the separate and independent management and control by its officers and directors, the management and control by the Securities Co., and to vest in the Securities Co. the selection of the officers and directors of the railway lines and the control and disposition of the earnings of each of them.

In paragraph XVIII it is alleged that the agreement complained of has been consummated, and the two systems are now under the management and control of the Securities Co., and by reason thereof all competition between the lines has been destroyed and a monopoly of railway traffic in Minnesota as well as without the state has been created, to the great and permanent and irreparable damage of the state and of its people, and in violation of its laws and of the laws of the United States, namely the so-called Anti-trust Act of Congress, approved July 2, 1890.

In paragraph XIX it is alleged that in carrying out the alleged agreement and plan of consolidation and monopoly, and in every step taken to consummate it, the officers and directors in each railway company were fully advised and consented thereto.

The prayer for judgment is that it be decreed:

1. That the agreement and combination alleged are unlawful, and that all acts done and to be done in pursuance thereof are contrary to and in violation of the laws of the state of Minnesota and of the United States.

2. That the Securities Co. be enjoined from acquiring, holding or voting any shares of stock of either

railway company, or taking any part in the management or control or operation of any of their lines of railway or the management or control of either company.

3. That the Northern Pacific Co. be enjoined from permitting the Securities Co. to vote the stock held by it, or recognizing it, or paying any dividends to it, as a stockholder; or from combining with the Great Northern Co., either directly or through the action of the shareholders; from making any form of combination or agreement which shall disturb the independence or integrity of the company or its independent management and control; and that the company, its officers, directors, etc., be enjoined from entering into any agreements directly or indirectly destroying free and unlimited competition with the Great Northern Co., by the interchange of traffic, pooling of earnings or division of profits or otherwise.

4. That like injunction be granted against the Great Northern Co. and its directors.

5. That the defendant James J. Hill, both individually and as an officer of the Great Northern Co., be enjoined from paying or permitting any dividends to be paid from the earnings of the Great Northern Co. on the stock held by the Securities Co., and be enjoined as an officer, director or stockholder in the Securities Co. from dictating the policy of, or directing or controlling the transportation or business affairs of, either of the defendant railway companies.

The bill asserts various grounds for relief against the agreements and acts complained of.

In paragraph V the state alleges its ownership of large quantities of land received by it under the swamp-ground grant of congress (by the terms of which the lands were granted to the state to be sold and the proceeds used in draining those not sold), and that the matters complained of will prevent the construction of branch railways of either company into or near these lands, and so will prevent the sale thereof.

In paragraph VI it is alleged that in supplying its various state institutions the plaintiff is engaged in domestic and interstate commerce, shipping such supplies over the lines of the two defendant railway companies.

Besides these grounds of action as a land-owner and shipper, the state, as representing its citizens, alleges in paragraph IX the injury to the people at large from the destruction of competition by reason of the alleged consolidation of the two railway companies.

In paragraph X the state assails the organization of the Securities Co. as a violation of two of its own statutes in regard to the consolidation of competing railway companies, and also of a highly penal statute prohibiting and punishing all conspiracies or combinations in restraint of domestic or interstate commerce, and all combinations between corporations whereby one of them surrenders its franchises or the control of its business to any other company, "in case where the purpose or effect of such combination is to control or

monopolize in any manner the trade or commerce or any part thereof of this state or of the several states."

The defendants, in their various answers, deny that the Securities Co. was the result of any such combination as that alleged in the bill; deny the formation of any combination in restraint of either state or interstate traffic, or that as a result of any combination or the formation of the Securities Co. there has been any such restraint. They deny that the Securities Co. is a railway corporation, or that its purchases of stock are in any way obnoxious to the laws of Minnesota. They allege that the Securities Co. is the result of a combination which was formed soon after an attack had been made on the property and commerce of the defendant railway companies, which attack, if successful, would have been destructive of that commerce and would have entailed upon them ruinous losses; and that such combination was formed by persons holding a minority of the stock of the two railway companies for the purpose of protecting their own shares and that of their fellow-shareholders, and the property and commerce of their respective companies, from a repetition of such attacks; and that they did not aim at acquiring a majority of the shares of each railway company or to suppress competition between them, and they say there has not been any such restraint or suppression.

The history of the formation of the Securities Co. and of the events which led up to it, is fully stated in the evidence largely in testimony introduced by the plaintiff.

The Facts and Evidence.

[The figures refer to the pages of the record.]

Ever since the opening of the railway of the Great Northern Co. to Puget Sound in 1883, that company has been vigorously engaged in the creation of a traffic, both interstate and international, which was essential for its own existence as well as to the development of the country traversed by its road. During the first three years of that time, the lines now belonging to the Northern Pacific Co. were in the hands of receivers, but since they emerged therefrom, and were acquired by the present Northern Pacific Co., defendant here, in 1896, that company has pursued the same course as the Great Northern Co.

What has been done towards building up a commerce with eastern Asia, as well as between the central states and the Pacific coast, what obstacles have been encountered and surmounted, and in what manner, are recounted by Mr. Hill in his testimony (912–920, 927, 931–3).

And such commerce was and is in competition with the whole world (Mr. Hill, 929, 944, 985–6).

How it became indispensable to the companies to have an eastern connection which could be depended upon to furnish a market for their east-bound traffic, supplies for their west-bound traffic to the Pacific coast as well as to Japan and China, to furnish the coal indispensable for their own use and the use of the dwellers along their lines east of the Rocky mountains; and how the roads of the Burlington system fulfilled these requirements better than any other; and how the two defendant companies, in the spring of 1901, joined in a purchase of the

shares of the Burlington Co. to the amount of about 108 millions par value, (each company separately buying and owning one-half,) at a cost of $200 per share, or about $216,000,000 in all, paying for them in their joint four-per-cent long-time bonds:—all of these matters are recounted in the testimony, (Mr. Hill, 919–920, 921-9; Mr. Weyerhaeuser, 996-7; Mr. Harris, 997-1008, 1015-1017, 1020, 1023-4; Mr. Hill, 58-61; Mr. Steele, 476-478). And see the Trust Deed securing the joint bonds of the purchasing companies (758-800).

Almost immediately after this purchase, persons interested in the Union Pacific system purchased in the market 78 millions of the 155 millions capital stock of the Northern Pacific Co. That capital was divided into 80 millions of common and 75 millions of preferred stock. The purchases in the Union Pacific interest comprised 37 millions of common and 41 millions of preferred stock, and were made in hostility to the enterprise and commerce of the defendant railway companies.

That such holding of a majority interest in the Northern Pacific stock by persons whose chief interest was in the Union Pacific system would be ruinous to the interests of these two defendant railway companies and their shareholders, and especially to their great enterprise of building up an interstate and oriental commerce in aid of which they had purchased the Burlington shares and incurred obligations to the amount of more than 200 millions of dollars,—in short, that the injury to each of the defendant companies and their enterprise would have been destruction, is shown by the testimony of Mr. Hill.

It would not have diverted the business to another line, for no other line was built so as to be capable of doing it. And no other line could obtain the essential return freight. Hence the commerce would have ceased to exist (Mr. Hill, 943–4, 985–6, 989–990).

On learning of these purchases, J. P. Morgan & Co., who had reorganized the present Northern Pacific Co. after the bankruptcy of the old company, and had been since 1896 its financial agents, considered themselves bound in honor to protect the interests of the shareholders and to that end went into the market and bought 15 millions of the Northern Pacific Co's common stock, which, added to their former holding, made between 20 and 21 millions. At the same time, Mr. Hill and his friends held about 20 millions common stock of the Northern Pacific Co., being what was left of about 30 millions which they had bought in 1896 and two or three millions which they had bought since that time, (all the purchases being on individual account and not joint account,) and which had been reduced by sales to from 20 to 21 millions; so that the holdings of J. P. Morgan & Co. and Mr. Hill and his friends amounted to about 41 millions, being a clear majority of the common stock.

During the operations of the opposing parties, many persons had sold to one party or the other stock they did not own. The competition between these sellers to buy stock for delivery pushed the price of common stock, at one time, to $1,000 per share, May 9, 1901, and threatened a general panic and caused alarm in all the money markets of the world. The Union Pacific party, who had just bought 78 millions of stock on credit, were naturally desirous of allaying this tempest, and, at a meeting of bankers and others called

to devise means of alleviating the financial situation, the Union Pacific interests agreed that Mr. Morgan should have power to name the Board of Directors of the Northern Pacific Co., to be chosen at the October election (Mr. Hill, 79, 80, 83, 87, 88, 92, 93, 177; Mr. Steele, 484-8, 498; Mr. Morgan, 538-9, 541-2).

But there was no agreement as to what persons should be named as directors by Mr. Morgan, nor any agreement as to any purchase of the stock held by the Union Pacific interests.

As the preferred stock was by its terms subject to retirement at par on the first day of January, 1902, and as the decision of this question was with the board of directors, and as J. P. Morgan & Co. had some months before, and before the dissolution of the voting trust controlled by them, determined on the retirement of the preferred stock, this action in respect of the board of directors sealed the fate of that stock, and left the stock-control of the Northern Pacific Co. (or rather the power to obtain it by exercising their right to purchase at par their proportionate share of the new common stock to be issued in place of the preferred stock when retired) absolutely with Mr. Hill and Mr. Morgan and their friends (Mr. Hill, 97, 112–114, 133-4; Mr. Morgan, 524, 525, 567-8; Mr. Mellen, 600, 601; Mr. Harriman, 577, 880).

The salvation of the interests thus attacked had lain in the fact that the attacking party had been misinformed or ill advised as to the seat of the power to retire the preferred stock. Otherwise instead of buying 37 millions of common and 41 millions of preferred, they would have bought 41 millions of common and 37 millions of preferred, in which case nothing could have prevented their absolute stock control of the

corporation with the disastrous results which Mr. Hill has described.

And, as just such an attack might be renewed by the same or other parties, as a change of ownership of but a few millions—a change that might at any time result from death or otherwise—would change the balance of power in the corporation, and as the makers of any future attack could not possibly make the mistake of buying preferred stock for common, Mr. Hill and his friends and J. P. Morgan & Co. deemed it absolutely necessary to take measures which should protect their property and that of their fellow shareholders, and the commerce of the two roads, and the enterprise which they had undertaken, and which required every advantage which the Burlington connection could give. For some years before this time, Mr. Hill and nine or ten friends, owners of somewhat less than 30 per cent of the Great Northern shares, had considered favorably a project of uniting their shares and transferring them to a corporation which should issue its own shares in payment, so that the railway shares would be kept together and voted as a unit, and no other interest could acquire the control of any of them without acquiring a majority of the shares of the new company, unless such company should be disposed to sell; and, in case of sale by the new company, all the shares would stand on the same footing. In the meanwhile the original holders who would thus dispose of their shares, would hold stock of the new company, which they might deal with at their will. Their reasons for this were that some of them were advanced, others far advanced in years. They had for many years been connected with the corporation, had been consulted largely as to its

policy and desired that policy to be continued, and also that all their shares should be treated alike in case of any disposition. Up to the time of the raid, no definite action had been taken towards carrying out this project (Mr. Hill, 115, 117, 939, 942–3; Col. Clough, 205–6, 233–5; Mr. Kennedy, 362–5; Mr. Baker, 403, 406; Mr. Thorne, 422–423; Mr. James, 436–8).

Early in June, 1901, Mr. Kennedy, one of Mr. Hill's associates, owning Great Northern stock as well as Northern Pacific stock, and who had just returned from Europe, suggested to Mr. Hill, with a view to protecting their Northern Pacific interests from such a raid, that their Northern Pacific stock also should be transferred to the projected holding company for their Great Northern shares. This suggestion did not include the J. P. Morgan & Co. interests in Northern Pacific, and J. P. Morgan & Co. had but a trifling, if any, interest in Great Northern shares (Mr. Hill, 116–7, 159–160; Mr. Morgan, 547).

In the course of the summer Mr. Kennedy's suggestion was further developed. It had been early proposed that the projected holding company for Great Northern shares should be open to all Great Northern shareholders who might wish to take advantage of it. The reason of this was that during the whole history of the Great Northern Co., all shareholders had acted in entire harmony, and no advantage had ever been offered to or taken by any that was not offered to all; and they did not wish that any of the shareholders should be in a position to say that Mr. Hill and those other gentlemen had made for themselves a company, into which the great body of shareholders of

the Great Northern Co. were not permitted to enter; and it was determined that this proposed holding company to include the Great Northern and Northern Pacific shares of Mr. Hill and his friends should be open to all the Great Northern shareholders. It was not expected that any great number of the latter would dispose of their shares to it, for the price proposed to be paid ($180 per share in stock of the new company) was considerably below the ordinary market price of Great Northern stock (Mr. Hill, 121, 160; 939, 941-2, 956-8; Mr. Kennedy, 364-366; Mr. James, 441).

The idea of placing a majority, if possible, of Northern Pacific shares where they could be protected from a recurrence of such a "raid" had also occurred to Mr. Morgan and was mentioned by him to his partners on his return from Europe early in July. His purpose in so doing was simply the protection of the Northern Pacific stockholders, with no view whatever of combining the stock of the two companies in one ownership—in fact, his project was limited to Northern Pacific shares. At first he had in mind placing the shares in a trust company, but this was soon abandoned, as, from its small capitalization, a trust company could be bought up easier than the railroad company. About the month of September, learning of the enlargement of the plan of the Great Northern holding company, and the large capitalization resulting therefrom, which large capitalization would add greatly to the protection of the Northern Pacific stock if transferred to it, Mr. Morgan proposed to Mr. Hill that he would turn in the Northern Pacific stock of J. P. Morgan & Co. and their friends to this proposed holding company. This was looked upon favorably, and with the usual delays in such matters

the Northern Securities Co. was formed (Mr. Steele, 490, 499, 504; Mr. Morgan, 545–550, 555–6, 563–4; Mr. Kennedy, 398).

The following matters are especially to be noted:

Mr. Hill and his friends bought, in 1896, 29 millions of stock of the Northern Pacific. In May, 1901, they had but 20 millions, which does not indicate any plan of Mr. Hill and his friends to acquire control of the Northern Pacific Co. (Mr. Hill, 80, 177; Mr. Kennedy, 384; Mr. Morgan, 516, 517).

At the time of the purchase of the Burlington shares, when the two companies incurred a joint obligation of about 216 millions for the shares which they had bought in severalty, about 54 millions each, there was no thought on the part of any one of forming a company to hold the shares of *both* defendant railway companies. If such plan had then existed, it would certainly have been put in operation before the companies had incurred this enormous debt, each relying for its protection wholly on the good faith and self-interest of the other. On this point, that any union of stock in a holding company or otherwise was not thought of at that time nor until after the raid, the testimony of Mr. Hill and of Mr. Morgan is uncontradicted and conclusive (Mr. Hill, 935–6; Mr. Morgan, 535).

While it was expected that the gentlemen who had for so long been considering favorably the project of a holding company, would transfer their shares to it when formed, yet there was no agreement among them that any one of them would transfer the whole or, indeed, any part of his shares. In point of fact, Mr. Hill kept out nearly 3 million of his Great Northern stock from motives of sentiment.

And, indeed, there was no need of agreement as they were familiar with each other's views, their interests were the same, and each one naturally expected that the others would do what was considered for the interest of all (Mr. Hill, 143, 146–7, 949; Mr. Kennedy, 387–8, 393–4; Mr. Steele, 503–4; Mr. Baker, 413–4; Mr. Thorne, 427; Mr. James, 447–450, 455).

It has been erroneously asserted that these gentlemen agreed among themselves that when the proposed holding company should be formed they were to use their influence with their fellow-shareholders to transfer their shares to the company, and that the shares which the company thus obtained from other shareholders than Mr. Hill and his associates were obtained by means of such influence. Nothing can be farther from the truth. There is not a scintilla of evidence in support of such assertion (Mr. Hill, 950–5; Mr. Morgan, 564; Col. Clough, 210, 254).

And the most that is claimed by appellant in its brief is that the agreement among the promotors of the Securities Co., was that the control of the Northern Pacific Co. was to be turned over to the Securities Co., but *not the control of the Great Northern.* As to this last appellant does not claim that the agreement went any farther than "that Mr. Hill and his associate shareholders of the Great Northern would also turn their Great Northern stock" (less than 35 million of the 125 million capital), "over to the Northern Securities Co. when organized, for the same purpose."

Appellant's Brief, pp. 26–7.

The Securities Co. was organized in New Jersey after an unsuccessful attempt to find a territorial Minnesota charter that would answer the purpose, and after examination of the laws of West Virginia and

New York. New Jersey was chosen, not because of any marked difference between its corporation laws and those of the two other states, but because the laws of New Jersey, having been longer on the statute books, had been more fully construed.

It has been and probably will be objected that the New Jersey charter was chosen and that Minnesota was the only state for them to incorporate in. The value of this objection is made clear by the reason given for it, namely, that the holders of the Great Northern Co.'s stock had no business to leave their homes along the line of that road and go to New Jersey for a charter. But, as the Great Northern shareholders in Minnesota outside of the two principal cities could probably be counted on the fingers of one hand, as the holders of 155 millions of Northern Pacific stock would certainly owe as much of a duty to incorporate in Wisconsin as the holders of Great Northern stock would to incorporate in Minnesota, as nearly all the shareholders of both railway companies lived on the Atlantic coast, and as nobody incorporates in Minnesota who can help it, we submit that no argument can fairly be made to the prejudice of the defendants in this case, that the company was incorporated in New Jersey (Col. Clough, 206–209, 237–242, 245–253, 281, 292–300).

After its formation, the Securities Co. made large purchases of the stock of the two railway companies, mostly in exchange for its own shares and to the extent of about 40 millions in cash. Each purchase was made as a result of a direct communication with the holder of the shares sold—was an out-and-out purchase, the ownership by the Securities Co. being unconditional and free from trust. The Securi-

ties Co. is at perfect liberty to-day to sell to any one any or all of its shares in either company (Col. Clough, 210, 214, 289, 302; Mr. Kennedy, 385; Mr. Steele, 503-4; Mr. Morgan, 562, 564; Mr. Hill, 948-9; Mr. Baker, 419-420; Mr. Thorne, 431-2; and see Form of Offer to Sell Shares to Securities Co., pp. 1048-9).

The Securities Co. purchased from J. P. Morgan & Co. the shares, amounting to about 78 millions, which had been bought by the Union Pacific interests in their raid. They had been first purchased by Mr. Morgan, who assigned his purchase to the Securities Co. This stock had stood in the names of Harriman and Pierce and is known as the Harriman stock. When it came to be delivered, it appeared that there was less than had been supposed; and as the Morgan purchase had been made at a lump sum and not at so much per share, the Securities Co. refused to take it, but finally did so on abatement of the price (Mr. Hill, 124-131; Mr. Morgan, 558-9, 563; Mr. Harriman, 569-70, 575, 577-8; Mr. Perkins, 462-469, 474-5; Mr. Steele, 491-3, 497-8, 502-3; Col. Clough, 283-5, 287-8; Mr. Nichols, 326-8, 331, 336-7). The price paid was $8,915,629, in cash, and $82,491,871, in shares (Col. Clough, 199, 200).

The negotiations between Mr. Morgan and the Harriman party began early in October, 1901, but not until the board of directors of the Northern Pacific Co. had voted (on November 13, 1901,) to retire the preferred stock, and all hope of keeping the stock control of the Northern Pacific Co. was thus destroyed, did Mr. Harriman finally make up his mind to sell (577). The sale to the Securities Co. was made on November 18th (Col. Clough, 199).

Another cash purchase of stock was that of about

$34,000, of the new issue of Northern Pacific common stock, which the Securities paid for with that company's convertible certificates to the same amount, which it had bought at par for cash (Col. Clough, 289, 316-7).

The Northern Securities Co. was not formed for the sole purpose of acquiring shares of the two defendant railway companies. It was proposed to acquire the shares of other properties, valuable for use in connection with the railway companies, such as coal-mines, etc., but which the railway companies could not themselves well own (Mr. Hill, 119, 159; Mr. Morgan, 547; Col. Clough, 212; Mr. Baker, 423).

There was no purpose on the part of any of those connected with the Securities Co. to restrain or monopolize trade or commerce, nor to enhance prices. Their object was to preserve and enlarge the commerce of the roads (to increase immensely the volume of their traffic in the one way that was possible, *i. e.*, by making low rates) by defending the roads from such attacks as would necessarily restrict if not destroy their commerce, and especially that in aid of which the Burlington stock had been purchased. Commerce has not been restrained but has very largely increased, both the transcontinental and Asiatic as well as the local commerce; also the traffic in coal from the mines in Illinois which has been of incalculable advantage to the people of Minnesota and to the people along the lines of these roads during the past winter, and has done more than anything else to save them from a coal famine and make the country habitable. And rates have been reduced, not raised. (Mr. Kennedy, 388-9; Mr. Perkins, 475; Mr. Steele, 505; Mr. Morgan, 563-4; Mr. Hill, 922-5, 945-6,

984–6; Mr. Harris, 1023–4, 1027; Mr. Mellen, 1034; Mr. Saunders, 1042–3).

And even if the measures thus taken to develop and protect the commerce of the railways, and which have already greatly extended and will surely continue to enlarge it—even if the effect of such measures be to restrain competition to some extent in the small percentage of the business of the railways in which the rates might be affected by competition or the want of it between them (Mr. Hill, 946, 963–4), yet even this small percentage of competitive business has shared and will continue to share the great increase of commerce and lowering of rates resulting from the enterprise for which the Burlington purchase was made, and the formation of the Securities Co. to protect that purchase.

Taking all the facts into account it cannot be said that the net result has been or will be a restraint of commerce. The contrary is true and is proved. And all the facts—all the commerce of the railway companies—must be taken into account, and not merely the small portion, if any, that may have been incidentally restrained.

> "All the facts and circumstances are, however, to be considered in order to determine the fundamental question whether the *necessary* effect of the combination is to restrain interstate commerce." *Addyston Pipe Co. v. United States*, 175 U. S., 211.

When the question is upon the restraint of trade or commerce.

> "Cases must be judged according to their circumstances, and can only be rightly judged when the reason and grounds of the rule are carefully

considered." *Oregon Steam Nav. Co. v. Winsor*, 20 Wall., 64, 68, per BRADLEY, J.

And any suppression or diminution of competition that may have taken place (whether attended or not with increase of rates) is the result not of any contract, combination or conspiracy in restraint of commerce, but of the sale and purchase of the railway shares, and the union of ownership in the Securities Co., and is an incident of such ownership. Any suppression or diminution of competition thus arising has never been held to be in restraint of trade or commerce.

Some of the More Conspicuous Errors and Omissions in the Statement of Facts in Appellant's Brief.

Pages 11–13. The statement of Minnesota statutes is incomplete. They are more fully stated *infra* in this brief.

Page 13. The statement that the Northern Pacific Co., a Wisconsin corporation, "became, under the laws of Minnesota, a corporation of this State"—that is, of Minnesota—is erroneous, if it mean anything more than that for purposes of the use and taxation of its railway in Minnesota it was placed on the same footing as corporations of that State.

Page 15. The statement that the Northern Pacific Co. and the Great Northern Co., having bought nearly all the shares of the Burlington Co. (upwards of $100,000,000 at par value), "had issued" (*i. e.*, caused to be issued) "in payment therefor, for each dollar of stock so acquired, two dollars in four per cent. joint collateral bonds of said C., B. & Q. Railroad Company, guaranteed by said Northern Pacific and Great Northern Railroad Co.s" is wholly erroneous.

There was no such "high finance" as this. The fact is, and was proved by plaintiff itself, that the purchasing companies made payment in their own joint bonds (Record, pp. 758, 761, Plff.'s Ex. 8).

The error is extraordinary, and the more so that in its brief in the Circuit Court (page 5) the plaintiff correctly states that the two purchasing companies acquired substantially all the shares of the Burlington Co., "and issued in payment therefor, for each dollar of stock so acquired, two dollars in four per cent. *joint* collateral bonds."

Page 15. The statement that Messrs. Morgan and Hill "dominated and practically controlled" the two defendant railway companies, and "decided to purchase for said railway companies the property and franchises of the Chicago, Burlington & Quincy R. R. Co.," and that "no official action was taken by the stockholders or directors of either the Great Northern or the Northern Pacific Cos. relating to this purchase until some time in the spring of 1901, and long after Messrs. Hill and Morgan had agreed upon the same with a committee representing the C., B. & Q. Co.," is one continuous error—an error repeated on page 70.

Messrs. Hill and Morgan did not dominate nor control.

They did not decide to purchase for the railway companies "the property and franchises of the C., B. & Q. R. R. Co."

What they decided to do and what they did was this: (1) Mr. Hill, by negotiating with the Executive Committee of the Burlington, ascertained at what price and on what terms they would recommend their shareholders to sell their shares to the Northern Pacific and the Great Northern companies, and (2) agreed with the committee "upon a basis of purchase, subject to the approval of the boards of the different companies"—each Burlington shareholder being, of course, at liberty to sell or not, on those terms, as he should see fit.

Plff.'s Evidence (Mr. Hill) 57, 59, 60; Mr. Morgan, 532. And see 991–2 (Mr. Hill).

This action of Messrs. Hill and Morgan was, of course, not binding on anybody. The negotiation was concluded some time in April, 1901.

The board of directors of each of the defendant

railway companies voted to make an offer for the shares on the basis reported to them. This was not "*long after* Messrs. Hill and Morgan had agreed upon the same" (*i. e.*, the purchase, according to plaintiff) "with a committee representing the C. B. & Q. Co.," but was in the before mentioned month of April (Mr. Hill, 936).

Page 22. There was no connection between the formation of a holding company and the retirement of Northern Pacific preferred stock (Mr. Hill, 131; Mr. Morgan, 562; Mr. Perkins, 473).

Page 28: Mr. Hill's fixing of basis of exchange. A reference to the very place in appellant's testimony cited for its statement, shows that Mr. Hill's fixing of the basis of exchange was in *June*, 1901, when the first suggestion of a company to hold *any* Northern Pacific shares was made; that it had reference only to the Northern Pacific common stock (about $20,000,000) held by the persons who, with Mr. Hill, held about thirty-three million of Great Northern stock. It was "fixed" (or rather suggested), not by Mr. Hill alone, but on consultation with others interested. It had no reference to a company to acquire additional Northern Pacific stock. No such company had there been thought of (and see pages 54, 55 of Appellant's Brief).

Page 28: Counsel are pleased to call the incorporators of the Securities Co. "three clerks, selected by Mr. Hill and Mr. Morgan," and on page 29, "three young men." They may have been guilty of the latter "atrocious crime," though the record does not say so. Nor is there any evidence that they were "clerks." On the contrary, Mr. Francis Lynde Stetson, plaintiff's witness, says (671) they "were all gentlemen of substance who put in their own money."

Page 36. Just what Col. Clough meant by "legislative contracts with the State of Minnesota, so that they would be beyond the power of amendment," he explains on page 238, folio 947.

Page 57. "The basis of exchange for the stock of the Union Pacific interests and the amount to be paid therefor was fixed by Mr. Morgan and Mr. Hill prior to the organization of the Securities Co."

No authority for this statement is cited, and there is none.

The purchase of this stock was in the first instance a matter between Messrs. Morgan & Co. and Mr. Harriman, with which neither Mr. Hill nor the Securities Co. had anything to do (Mr. Hill, 129; Col. Clough, 307; Mr. Morgan, 558), although on November 15, on being informed that Messrs. Morgan & Co. were about to acquire the shares, the directors of the Securities Co. voted to authorize the president to take the stock from Morgan & Co., at the price they were to pay for it (Mr. Nichols, 342; Col. Clough, 283-5). On conclusion of the purchase by Morgan & Co. they assigned their bargain to the Securities Co., and directed Mr. Harriman to deliver the stock to the Securities Co. This was the first intimation Mr. Harriman had of any connection of the company with the transaction (Mr. Harriman, 571-2).

The stock being tendered to the Securities Co. on November 18th, that company refused to take it at the round sum at which Messrs. Morgan & Co. had bought, for the reason that it was less in quantity than had been represented. An abatement of price was finally agreed on, and the company took the shares at the reduced price (Col. Clough, 284; Mr. Perkins, 474; Mr. Harriman, 578).

Page 59 *(d)*. The circular letter of the Securities Co. offering to buy Great Northern shares contains no "urging" (Ex. A, 1048-9).

No evidence has been or can be offered that the promoters of the Securities Co. had any of the agreements mentioned.

Page 61 (*f*). The thing which counsel think "remarkable" is just the thing which did *not* happen. It was Northern Pacific stock, and not Great Northern shares, that were originally held without transfer for convenience of use as collateral if so desired (Col. Clough, 303, fol. 1208).

Page 70 (5). "Hill and Morgan consummate the purchase of the C., B. & Q. Company for the Great Northern and Northern Pacific Railway Companies. No meeting of either the stockholders or the directors of the Great Northern or Northern Pacific Railway Companies had been held to authorize this."

But "the C., B. & Q. Co." was never bought. And Messrs. Morgan and Hill did not buy even the shares, or any of them, of that company.

See our correction, *supra*, of like misstatements on the same subject, on page 15 of appellant's brief.

Page 70 (7). There is no evidence of any such agreements.

Page 71 (9). Messrs Morgan & Co., did not corner Northern Pacific common stock, nor did their purchases cause the $1,000 per share price of that stock.

Page 71 (10). Mr. Hill had nothing to do with any such agreement.

Page 71 (11). No agreement was made in June, 1901, to form a corporation.

The most that was done was that on Mr. Kennedy's suggestion he and Mr. Hill and one or two of their

associates in Great Northern, considered the question of broadening the scope of their contemplated holding company for Great Northern shares, so as to permit the transfer to it of the Northern Pacific shares held by them, but of no other Northern Pacific shares (Mr. Hill, 116-7, 159, 160; Mr. Morgan, 547).

The matter of taking in the Northern Pacific shares of J. P. Morgan & Co. or of any one else arose two months later (Mr. Morgan, 546, 555).

Page 72 (13). As to Mr. Hill's fixing basis of exchange, see *supra*, remarks on like statement on page 28 of appellant's brief.

Mr. Morgan simply made some changes in the *existing* Northern Pacific board.

Page 72 (16). No authority is cited for this statement and there is none.

Page 73 (17). There is no evidence that Morgan & Co.'s negotiations were for the Securities Co.

On the contrary, both Mr. Harriman and Messrs. Morgan & Co. considered that the latter were buying for themselves (Mr. Morgan, 558; Mr. Harriman, 571). And see comment on a like statement on page 57 of appellant's brief).

Page 73 (18). No such agreement was made (see testimony of appellant's own witness, Mr. Harriman, 570-1). After he had agreed to sell to Morgan & Co., he was told on November 18th to deliver the stock to the Securities Co. This was the first he knew that the stock was to go to the latter (572).

There was no bonus paid.

The ingenious manipulation of the appellant's own evidence in this (18) cannot be fully appreciated without examining the evidence itself.

Page 75 (26). That the Securities Co.'s circular of

November 22, 1901, is a mere offer to buy Great Northern shares, not "recommending or suggesting" anything, has already been pointed out in our comments on page 59 (*d*) of appellant's brief.

Page 72 (28). Mr. Hill's letter of November 30, 1901, is in no sense a circular. He had already received and answered letters of inquiry, and, being about to leave New York, prepared this form of a letter to be sent only in answer to individual letters of inquiry (Col. Clough, 255; Mr. Hill, 952).

Page 76 (31) and (33). The papers speak for themselves.

Page 77 (34). The evidence is that there has been no falling off of competition.

The very rate of the withdrawal of which the State makes so much, as a *competitive* rate, was made by a joint circular (of January 25, 1900), as stated in the circular withdrawing it.

A *competitive rate* made *by agreement* indicates a vigorous if not vicious competition.

The former practice, restored in some instances, the companies were required to abandon as illegal under the long and short haul clause of the Minnesota railway law, which makes no allowance for difference of circumstances.

In Beck's case, the distance from Fergus Falls to Moorhead by Great Northern was about 50 miles, by Northern Pacific 150 miles. The latter was obliged to give up meeting the Great Northern rate or else give every intermediate point on its line the benefit of it, which it had not done before (thus violating the law), which of course was impracticable.

The State has searched Minnesota and even North Dakota for evidences of the horrible consequences re-

sulting from the "merger." It has produced the best it could find if not all it could find.

And what does it amount to?

A worn out spur track in North Dakota, built into a man's farm in 1887, when he farmed 8,000 acres, is taken up in 1901, when he had sold all his land except less than 1,000 acres.

Two farmers in Minnesota found it hard to get cars during the notorious car shortage and railway blockades of the fall of 1902.

Some normal school girls were carried from St. Paul to Moorhead in a special car on the Northern Pacific and returned in like manner by the Great Northern. This *before* the merger; nothing of the kind since. And nothing of the kind *before* except this one instance, and nothing asked since.

And the witness, the normal school principal, though giving, in his direct testimony, the impression that this special car was the result of competition, and amounted to a preference not shown the general public (and so illegal, under our stringent law) was obliged to confess on cross-examination that for anything he knew the young ladies paid full value for this extra accommodation, and so the law had not been violated, nor had the special case been the fruit of competition.

In examining this witness, the appellant, to prove the advantages of the now suppressed competition, labored to show that before the merger the companies had given the Normal School girls free seats in parlor cars, and other conveniences, for which the general public were charged. The witness could not testify to a personal knowledge of any such illegalities.

One cannot read the evidence on this point without getting the impression that what the State is com-

plaining of is the abolition of a competition carried on by practices forbidden by law—a singular position for the law officers of the State.

But they are driven to this because under the State railway law, as under the Interstate Commerce Law, there can be no real competition between railways that is not illegal and dishonest.

Argument.

The plaintiff sues on several grounds and in more than one capacity.

1. In respect of the swamp lands, as a trustee under the act of congress making the grant, for relief against a threatened obstruction to the performance of the trust.

2. As a property owner and shipper, for relief against the violation of rights claimed to be secured to it.

(a) By the interstate commerce act.

(b) By the federal anti-trust act.

3. As a sovereign state to enjoin the violation of certain of its own statutes forbidding the consolidation of competing railway companies, and forbidding combinations in restraint of domestic and interstate commerce.

I.

The claim under the swamp-land grant.

The original act of 1850 (9 U. S. St. 549) which the plaintiff makes part of its bill (par. V. p. 18*a*) grants to Arkansas all the swamp lands in that state "to enable the state of Arkansas to construct the necessary levees and drains to reclaim" them, "*provided*, however, that the proceeds of said lands, whether from sale or by direct appropriation in kind,

shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid."

By the act of March 12, 1860, cited in the bill, the provisions of this act were extended to Minnesota, and the state has over 3,000,000 acres derived from this and from other grants (Bill, par. V, p. 18*a*).

It is not denied by the defendants that the state holds these swamp lands charged with a trust (though a trust in favor of the United States alone, and for the exercise of which congress alone can call the state to account). *Stearns v. Minnesota*, 179 U. S. 223, 231.

And with this trust, the acts of congress also make the state an agency of the United States to carry out the purpose of the latter by effecting a drainage of the swamp lands with the proceeds of lands sold, an agency not easily distinguishable from that of a telegraph company under the act of 1866, or a railway company chartered by congress. *W. U. Tel. Co. v. City Council of Charleston*, 56 Fed. 419; *W. U. Tel. Co. v. Texas*, 105 U. S. 450; *Thomson v. Pacific Rd.*, 9 Wall. 579.

And it may be that the state can sue in equity to enjoin or remove obstructions to the execution of the trust, to the performance of the duties with which it is charged by the act of congress.

But such suit can only be maintained upon a case sufficient, under ordinary principles of equity, to entitle plaintiff to a decree. Here the proof wholly fails. There is no pretence of any direct obstruction of the sales of swamp lands, or the use of their proceeds. The most that is said or can be said is that the railway companies during the five months that elapsed between the formation of the Securities Co. and the beginning of this suit, did not build branches

into these lands. That is, they did not, during these five months, do what thay and their predecessors had continuously omitted doing during all the years of their existence, during all the time when, as the bill says, they were in "active competition." If such omission has gone on for more than 20 years, without actionable injury to the state, and, so far as appears, without any complaint by the state, it cannot be that the mere continuance of it since November 13, 1901—even its continuance to the present time—is an obstruction to the execution of the trust, or in any wise an injury to the state entitling it to an injunction. The state has made no demand that any particular branch or any branch should be built. It has not shown that any particular branch is needed or desirable, or that such branch offers such prospect of traffic as to justify its construction. Neither railway company is under any obligation to build branches. Neither has any inducement to build them except the prospect of fairly remunerative traffic from them. That inducement will be as strong, and the branches are as likely to be built, if the majority of the railway companies stock is owned by the Securities Co. as it would be if the railway companies were made up of wholly different stockholders, and were engaged in diminishing their ability to build the desired branches by unprofitable competition.

At the most the showing made by the plaintiff of injury from the formation of the Securities Co. is wholly conjectural. Plaintiff conjectures that there will be a falling off of railroad building owing to the formation of the Securities Co.—that the companies will be less ready to build unprofitable lines. Another might conjecture, and with as much ground, that any

such falling off in building branch lines is owing to the continued pressure of the public and the railroad commissioners upon the companies, continually crowding down the rates, and sometimes crowding them down so far that the companies have to seek protection in the courts, and have little inducement or ability to engage in new construction.

II.

The State as Land Owner and Shipper.

What has already been said applies equally to the case made by the state in these two capacities. In these capacities the state stands on the same footing as an individual and must make the same case that would be required of an individual land owner and shipper.

The right to unrestricted interstate commerce is secured by the interstate commerce law and the anti-trust law.

But while the state alleges itself to be engaged to interstate commerce, and that the defendants have made a combination in restraint of interstate commerce and in violation of the anti-trust act, and are pooling the earnings of the two railway companies in violation of the interstate commerce law, yet the proofs fail to sustain plaintiff's right to equitable relief on any of these grounds.

Plaintiff has not proved any injury to itself not common to every land owner and shipper in Minnesota, and to every person in Minnesota or out of it, who is

likely in the future to make any shipments, great or small, over either railway. For there is no proof that that the plaintiff has been already overcharged on any shipment it has made ; or that either railway company has threatened to overcharge it in any shipment it is about to make in the near future. But it is charged that a combination has been made whereby competition is suppressed, and that from the infirmity of human nature the railway companies will no longer compete with each other, but will unite in charging higher rates than if competition continued.

There is no proof of suppression of competition. The proof is that it is as active as ever (Mr. Mellen, 605–7 ; Mr. Morgan, 521, 523 ; Mr. Hill, 946).

There is no proof of an advance in rates ; the proof is the other way (Mr. Hill, 933, 979–80). There is no proof that the companies have charged or threaten to charge unreasonable rates. Presumably they have charged and will continue to charge only what is reasonable. In such case neither plaintiff nor any other shipper will suffer injury, for no shipper has any legal or equitable right to have his freight moved at less than a reasonable rate.

There is no proof of a demand on the companies for either a present or future carriage, or a demand by them of unreasonable rates, or a threat by them of charging such rates. An intending shipper (whether having made shipments in the past or not) is not entitled to an injunction in advance of making or tendering a shipment, on the ground that, at some time in the future, when he comes to make shipments, there will be danger lest the companies, because of non-competition, may charge him an unreasonable rate.

III.

The suit by the state as a sovereign to enforce its own statutes.

The statutes, pleaded in the bill of complaint are of two classes, (1) statutes forbidding the consolidation, etc., of parallel or competing railway companies or their lines. (2) An anti-trust act, the general terms of which are claimed by plaintiff to include railway companies and railways and the stock ownership therein.

A. The Anti-Consolidation Laws.

(1)

The earliest Minnesota statute on the subject of railway consolidations was passed in 1860, being Chapter 70 of the General Laws of that year. At the time of the Revision of 1866 it was still in force and unchanged, and was carried into that Revision without alteration, as Section 36 *et seq.*, of Gen. St., 1866, c. 34, which section and an additional section (39) in *pari materia* are as follows :

> SEC. 36. Whenever the lines of railroad of any railroad corporation, whether organized under this title, or by virtue of a special charter, or any portion of such lines, have been or may be constructed so as to admit the passage of freight or passenger cars over any two or more of such roads, continuously, without break or interruption, *such corporations may consolidate themselves into a single corporation*, in the manner following :
>
> FIRST. Any two or more railroad corporations may, *by their directors*, enter into an agreement, under the corporate seal of each, for the consoli-

dation of the said corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; *the name of the new corporation;* the names and places of residence, and number of directors thereof; the time and place of holding the first election of directors; the number of shares of capital stock in the *new corporation;* the amount of such shares, which shall not be less than one hundred dollars; the manner of converting the shares of capital stock of each of said two or more corporations into the shares of such *new corporation;* the manner of compensating stockholders in each of the *old corporations*, who refuse to convert their stock into the stock of the *new corporation;* with such other details as they may deem necessary to perfect the *consolidation* of such corporations; and such *new corporation* shall possess all the powers, rights and franchises conferred on each corporation, and be subject to all the restrictions, and perform all the duties, imposed by the provisions of this title; provided, that all stockholders in either of such corporations, who refuse to convert their stock into the stock of such *new corporation*, shall be paid at least par value for each of the shares so held by them, if they so require, previous to the consummation of said consolidation.

SECOND. Such agreement of the directors shall not be deemed to be the agreement of the said *old corporations*, until after it has been submitted to the stockholders of each of said corporations, separately, at a meeting thereof, to be called upon a notice of at least 30 days, specifying the time and place of such meeting, and the object thereof, to be addressed to each of such stockholders, when their place of residence is known, and deposited in the post-office, and published for at least three successive weeks in one newspaper, in at least one of the cities or towns in which each of said corporations has its principal place of business, and is sanctioned by such stockholders, by a vote of at least two-thirds in amount of the stockholders present at such meeting voting by ballot, either in person or by proxy, each share of capital stock being entitled to one vote; and when such agreement of the directors is so sanctioned by each of the meetings of the stockholders separately,

it shall be deemed the agreement of the said old corporations.

SEC. 37. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the secretary of state, *the said old corporations shall be merged in the new corporation* provided for in such agreement, to be known by the corporate name therein mentioned; and the details of such agreement shall be carried into effect, as provided therein.

SEC. 38. Upon the election of the first board of directors of *the corporation created by said agreement*, the rights and franchises of each of said old corporations, their rights and interests in and to every species of property, real, personal and mixed, and things in action, shall be deemed to be transferred to and vested in such *new corporation*, without any other deed or transfer; and such *new corporation* shall hold and enjoy the same, together with the right of way, and all other rights of property, in the same manner, and to the same extent, as if the said old corporations had continued to retain the title and transact the business of such corporation; and the titles and real estate acquired by either of said old corporations shall not be deemed to revert or be impaired by means of anything in this title contained; *provided*, that all rights of creditors, and all liens upon the property of either of said old corporations, shall be preserved unimpaired; and all the debts, liabilities and duties of either company shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it.

"SEC. 39. Any railroad corporation heretofore or hereafter incorporated, whether under the provisions of this title or by special charter, may at any time, and by means of subscription to the capital of any other corporation, or otherwise, aid such corporation in the construction of its railroad for the purpose of forming a connection of said last-mentioned road with the road owned by the corporation furnishing said aid; or any railroad corporation may lease or purchase any part or all of any railroad constructed by any other cor-

poration whose lines of road are continuous *or connected* with its own upon such terms and conditions as may be agreed on; or *any two or more railroad corporations whose lines are so connected may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created; provided,* that no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each of said corporations has been called by the directors thereof at such time and place and in such manner as they shall designate, and the stockholders of at least two-thirds of the stock of such corporation represented at such meeting in person or by proxy, and voting thereat, assented thereto."

It will be noted that the only "consolidation" authorized by this law—the only consolidation authorized by any law of Minnesota then in existence—was a consolidation requiring

1. An agreement between the two corporations, as such, made by corporate action of each corporation, *first*, of the board of directors as a board, and, *second*, of the shareholders at a corporate meeting.

2. The filing of such agreement with the Secretary of State.

3. Payment of the value of their shares to such shareholders of either corporation as refused to come into the consolidation.

The effect of the consolidation was the formation of a "*new corporation*," in which "the said old corporations shall be merged."

(2)

These sections being in force without change, and being the only legislation of Minnesota on the subject

of consolidation of railway companies, etc., the Legislature, in 1874, passed the following Act (Laws 1874, C. 29, § 1):

> "SECTION I. No railroad corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchises of such corporation with, or in any way control any other railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line; and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues."

This statute is directed at *railway corporations*, their lessees, purchasers or managers. It says that no one of these shall—

(1) Consolidate the stock, property or franchises of the railroad corporation with any other railroad company owning or having under its control a parallel or competing line; or (2) in any way control *any other* railroad corporation owning or having under its control a parallel or competing line.

To bring any transaction within this act the parties to it must be, on the one hand, a railroad corporation or the lessees, purchasers or managers of a railroad corporation, and, on the other hand, another railroad corporation, owning or having under its control a parallel or competing line.

In this case the transaction is between the Securities Co., as buyer, and certain shareholders of the two railway companies as sellers of their shares. The Securities Co. is not a railroad corporation, and the selling

shareholders certainly are not. Nor are the Securities Co. or the sellers "the lessees, purchasers or managers of any railroad corporation."

There is no question of "lessees."

The Securities Co. is not the "purchaser" of any railroad corporation. If it is, when did it become so? Was it such before it bought any of the railway shares? Or did it become a purchaser of the Northern Pacific Co. as soon as it bought one share, or ten shares, or one-half of that company's stock? And if a purchaser of one-half of the shares of the company's stock would not make it a purchaser of the company, how can it be said that the purchase of three-quarters or nine-tenths would? In each of these cases how can the Securities Co. be said to have bought *the company*, when one-quarter, or one-half, or one share less than half of all the stock has not been bought by it? Is not all the stock not purchased still stock of the *company*? Are not its owners still shareholders and members of the corporation, with all the property and other rights of members?

One-half or three-quarters or nine-tenths of the shares in a corporation are not the corporation, and a purchaser of them does not buy the corporation.

Counsel for appellant argues (Brief, pp. 100–103) that whoever purchases a majority of the stock of a railway company is a purchaser of the corporation, because of two decisions, one in New Jersey and the other in Indiana, which, however, decide nothing of the kind.

In the New Jersey case one railway company had acquired fifteen-seventeenths of the stock of another, and had mortgaged it. The question was on the valid-

ity of its title to and its mortgage of the stock. The Court held that while the company was authorized by statute to buy *all* of the stock of another company in order to a consolidation, it did not have to buy all the stock in one purchase, but might make successive purchases of less than all as steps toward a consolidation.

In the Indiana case the question and the ruling were the same. It was decided on the authority of *Ryan vs. Leavenworth*, etc., Ry. Co., 21 Kansas, 365.

These decisions rest on the axiom that the greater power includes the less. But plaintiff's contention is that the less equals the greater—a purchase of a part is a purchase of the whole. To this proposition neither the cases cited nor any others give support.

Like observations apply to the amendment of 1889 to the Minnesota Act of 1881, quoted in Appellant's Brief, p. 103, with the addition that it is a misleading misuse of terms to describe the arrangement of various separate laws and parts of laws in a private compilation (and such is "Gen. St. 1894") as being thereby "codified."

That amendment provides that a railway company authorized to consolidate its property and franchises with those of another railway company, or to purchase the property and franchises of another railway company, "may effect such consolidation or purchase by acquiring the stock, bonds or other securities of such other railway company."

But can it be contended that a purchase of less than *all* the stock would effect a consolidation of the two companies, or of their property or franchises?

The act says "the stock," not a majority of the stock. If satisfied by the purchase of less than all the

shares, it is satisfied by the purchase of one share. There is no point between the purchase of one share and a purchase of all at which a line can be drawn, and it can be said that a purchase of more is enough and a purchase of less is not enough "to effect such consolidation."

And it is to be observed that it is only when a railway company *is* "*authorized to consolidate or purchase*" that this act allows such purchase to operate as a consolidation of the purchasing company and that whose stock is bought.

A purchase even of *all* the stock of two railway companies by an individual, or by a corporation not a railway company, does not effect a consolidation between the buyer and the company whose stock is bought; and it is only when the stock is bought—and bought by a railway company—for purposes of a consolidation between the buyer and the company whose stock is bought that the statute makes a purchase of stock equivalent to a purchase of the property and franchises of the company.

The Securities Co. is not the "managers" of either of the defendant railway companies. It is simply a shareholder, and the term "managers" is never applied to the shareholders. They do not manage. Their function—and their sole function—as respects the management of the company's affairs, is to choose managers. Those managers are usually called directors; by charter or other law they are in some cases styled "trustees," in others "managers." The shareholders are not the managers (*Pullman Palace Car Co. vs. Mo. Pac. Ry. Co.*, 115 U. S., 587, 596-7).

And by "managers," in this act, the legislature

meant those who manage the business, by whatever name called. In the general railway law of the State, in force ever since 1866, it is required that the articles shall state:

> "SIXTH. The names of the first board of direc'ors and in what officers or persons the government of the corporation and the management of its affairs shall be vested, *and when the same shall be elected*" (Gen. St. 1866, C. 34, § 3.

And in the case of each of these companies, the charter provides who shall be the managers, and they are not the whole body, nor yet the majority of the stockholders. And they are to be managers, not because owners of stock, but because chosen to be managers.

The Great Northern charter (Defts.' Ex. D, p. 1100) provides:

> "All the affairs and business of the said company shall be conducted by or under the direction of the board of directors, and they are authorized, for the purposes specified in this act, to make and establish regulations and by-laws, and to do all things not inconsistent with the Constitution and laws of the United States, or the laws of this territory or this act."

That of the Northern Pacific (Defts.' Ex. E, p. 1129) provides:

> "SECTION 9. All of the affairs of said company shall be managed by a board of directors who shall be stockholders, and who are hereby invested with all the powers of the corporation save as hereinafter provided."

Each charter goes on to provide for the choosing of the directors by the shareholders.

The prohibition laid on the "managers" by this Act of 1874 is imposed on them *as a body* and not as individuals. The reason, doubtless, being (if the Legislature did anything more than copy—as it did copy *verbatim*—this act from an enactment of another State) that any control of one railway company by another must necessarily be exercised by the Board of Directors of the latter, and that in proceedings for consolidation under the General Statutes of 1866, the initiative must be taken by the Board of Directors.

Taking this act as a whole, it is evident that it simply restricts the exercise of powers granted by the sections of the General Statutes of 1866 already quoted. Those powers could not exist or be exercised without that grant, and it would be absurd for the Legislature to take away or forbid the exercise of powers that did not exist. The Act of 1866 is broad enough to authorize the doing of every one of the things forbidden by the Act of 1874. The latter act is a restriction of the former, taking away powers given by it and taking them away from those to whom they had been given by it. The Act of 1866 did not give to shareholders in one railway company any power to buy shares in any other. Such power needed not to be given; it existed without any such gift. And so the Act of 1874 was not meant to take it away.

But whether or not the Act of 1874 can be given the sweeping effect claimed for it by the State, it does not indicate any settled policy of the State, and it long since ceased to be the law of the State. It was not in line with the general policy of the State; it was a sporadic exception to that policy, and was passed in

the height of the Granger agitation, when any law that would hurt railway companies was a good law to pass, and when not only legislatures but some courts were swept off their feet by the popular wave.

This war upon the railroads had its natural effect. For years Minnesota went hat in hand, begging capitalists to undertake the completion of unfinished roads endowed with large land grants by the United States. Their appeals were in vain, and even the gaps in the line connecting St. Paul with the Park region—the garden of the state—and with the Red River valley, remained open, a line which is now part of the main line of the Great Northern Company between St. Paul and Puget Sound.

Not until Mr. Hill and his three associates caused this line to and through the Red River Valley to be completed by the United States Circuit Court by its Receiver in 1878-9, with money furnished by them, was any railroad building done in Minnesota.

Like other delusions, the delusion that railway companies were enemies of the people passed away—at least for a time—and at its next biennial session, in 1881, the legislature signalized itself by doing away with the worst of the legislation against railways, including that which had placed on Minnesota the stigma—borne for 20 years—of being a repudiating State. The people had recovered their sanity, and their recovery was shown by a recurrence to the wiser counsels of earlier days.

Among the laws which felt the effect of this recovery was that of 1874. It was not in terms repealed. That was hardly to be expected, nor was it necessary. It was superseded by a clearly-expressed section in a carefully drawn act, based on the General Statutes of

1866 already set forth, extending the provisions of that act so as to include foreign railway companies, and covering the whole subject of railway consolidation.

(3)

This Act of 1881 (Laws 1881, c. 84) is entitled "An act to authorize any railroad company to lease, purchase, or in any way become owner of, or to control, any other railroad corporation, or to consolidate therewith."

The first section provides:

> "Any *railroad corporation*, either domestic or *foreign*, whether organized under a general law or by virtue of a special charter, may lease or purchase, or in any way become owner of, or control or hold the stock of, any other railroad corporation when their respective railroads can be lawfully connected and operated together so as to constitute one continuous main line with or without branches."

Section 2 provides as follows:

> SECTION 2. Any railroad corporation, whether organized under a general law, or by virtue of a special charter, of the state or territory of Minnesota, or under the laws of any other state or territory, whose lines of railroad now or hereafter constructed, within or without the state, can be lawfully connected and operated together, to constitute one continuous main line, with or without branches, so as to admit the passage of trains over them without break or interruption, *may consolidate* their stock and franchises, upon such terms as may be agreed upon, *so as to become one corporation*, by any name by them selected.
>
> Articles stating the terms of consolidation shall be approved by each corporation, by a vote of the stockholders owning a majority of the stock, in person or by proxy, at either a regular annual

meeting thereof, or at a special meeting called for that purpose, by a notice of at least thirty (30) days, stating the object of such meeting, to be addressed to each of such stockholders, when their place of residence is known, and deposited in the post office and published for at least three (3) consecutive weeks in one newspaper, in at least one of the cities or towns in which each of said corporations has its principal business office, or by consent in writing of a majority of such stockholders annexed to such articles; a copy of such articles of consolidation, and of the record of such approval, or of such consent, accompanied by lists of the stockholders of said corporation, and the number of shares held by each, duly certified by their respective presidents and secretaries, with the respective corporate seals thereto affixed of said corporations shall be filed for record in the office of the Secretary of State of this state, and of the State or States or Territories by or under whose laws the said corporations, parties of such articles of consolidation were created or exist, before any such consolidation shall have any validity or effect. Upon the filing for record of said copies, *the said corporations shall become merged in the new corporation* provided for in said articles, to be known thereafter by the corporate name therein adopted, and shall, within this state, succeed to all the rights, powers, franchises, contracts, privileges, immunities, liabilities, obligations and duties, liabilities to or exemptions from taxation, commutations, property, real, personal, and mixed, and things in action, as fully in all respects as the same were possessed by such old corporation or corporations, at the time of such consolidation under the laws of this state; and such *new corporation* shall hold and enjoy the same, and all and every part thereof, without impairment or change, as fully as if the said consolidation had not taken place. Provided that all rights of creditors, and all liens upon the property of either of said old corporations shall be preserved unimpaired, and all debts, liabilities and duties of either of said consolidating corporations shall thenceforth attach to said *new corporation*, and be enforceable to the same extent, and in the same manner as if such debts, liabilities, and

duties had been originally incurred by it; provided further, that all such corporations shall be subject to the laws of this state, and the jurisdiction of the courts of this state, in the same manner and to the same extent as domestic corporations."

Section 3 is as follows:

"SECTION 3. *No railroad corporation shall consolidate with, lease or purchase, or in any other way become owner of, or control, any other railroad corporation, or any stock, franchises, rights or property thereof, which owns or controls a parallel or competing line.*"

It is evident that this Act of 1881 is a recension and revision of the existing legislation of the State in respect to the consolidation of railway companies and the relation of competing companies, and their managers, etc., both in regard to the powers granted and those denied, the acts authorized and those forbidden.

It enlarges the Act of 1866, which was restricted to domestic companies, by authorizing consolidation with foreign companies.

It contains, in section one, new provisions in terms authorizing one company, domestic or foreign, to lease or purchase or in any way become the owner of or control another, or to hold the stock of another.

It contains in section 2 various modifications of the procedure by which a consolidation may be effected.

And as sections one and two state clearly and particularly just what powers are granted and what acts may be done in the exercise of them, so section 3 states with equal clearness and particularity what powers are withheld and what acts may not be done.

In this section it omits the prohibition to "mana-

gers " of a railroad company because included in the prohibition to the company. It omits the prohibition to lessors and purchasers probably for the same reason, and perhaps on the additional ground of its vagueness and uncertainty.

The act covers the whole ground before occupied by the sections 36-39 of the General Statutes of 1866 and the Act of 1874, and it covers more.

And under the familiar rule of construction, so often applied by this and other courts, this Act of 1881 must be deemed a substitute for the previous legislation and to repeal it.

The case of *Murdock vs. City of Memphis*, 20 Wall, 590, is directly in point, and the observations of Mr. Justice MILLER on the statutes there involved are strikingly applicable to those in question here. And see

Heckmann vs. Pinkney, 81 N. Y., 211.
Farr vs. Brackett, 30 Vt., 344.
Wakefield vs. Phelps, 37 N. H., 295.

In 1889, Section 2 of the Act of 1881 was amended by adding the following (Laws 1889, c. 228):

> Any railway company of this state, empowered by the laws thereof to consolidate its railway, property and franchises, or any portion thereof, with the railway property and franchises, or any portion thereof, of another railway company, may effect such consolidation or purchase, by acquiring the stock, bonds or other securities of such other railway company; and for the special purpose of acquiring the same, may create, issue and dispose of its own stock, bonds or other securities, in addition to the amounts of the same it is otherwise empowered to issue, to an amount not exceeding the actual value of the stock or bonds of such other company, acquired by it. Any railway com-

pany of this state may also, for any other purpose authorized by its acts or articles of incorporation, create, issue and dispose of such amounts of stock as the boards of directors may find necessary for such purpose. Prior to the issuance of any stock under the provisions of this act, the company issuing the same shall file with the secretary of state a duly authenticated resolution of its board of directors, stating the number and par value of the shares to be issued, and the particular purposes for which the same are to be issued.

Provided, That nothing in this act contained shall authorize any railway company to sell its capital stock for less than full par value thereof, in money, property, work or services.

Provided further, That nothing in this act shall be so constructed as to authorize the issuance or sale of any stock or bonds, by any such company, or the performance of any act, prohibited by chapter twelve (12) of the general laws of one thousand eight hundred and eighty-seven (1887), or by any other law of this state relating to the issuance or sale of the stock and bonds of any railway company therein.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved April 24, 1889.

(NOTE. Chap. 12, Laws 1887, referred to in the foregoing act, was entitled "*An act relative to the issue of false, fraudulent, and part-paid and unpaid shares of stock of railroad companies and providing a penalty therefore.*" The title of the act sufficiently discloses the nature of its contents.)

This act is relied on by appellant to show that a mere purchase of a majority of the stock of a railway company by another company consolidates the two companies, and has already been referred to *supra* in our refutation of any such doctrine. It will be noted that the act requires the purchase of *all*, and not merely a majority of the stock, and does not dispense with the vote of the shareholders of both companies required by the same section as originally passed.

By the first section of the Act of 1881, a railway company was already authorized to buy the stock of any company with which it might lawfully consolidate, and the purpose of this section was not to give an already-existing authority, nor to make such purchase operate as a consolidation, but to permit the consolidation to be effected by votes of the stockholders of the two corporations, as provided in Section 2, notwithstanding that the shares of one company were all held by the other, and to prevent any objections that might, on that ground, be made to the consolidation.

(5)

By an act approved April 15, 1899 (Laws 1899, C. 229), and not referred to in the bill, Section 1 of the Act of 1881 was amended "so as to read as follows:"

> SECTION 1. Any railroad corporation, either domestic or foreign, whether organized under a general law, or by virtue of a special charter, may lease or purchase, or in any way become the owner of, or control, or hold the stock, of any other railroad corporation, when their respective railroads can be lawfully connected and operated together, so as to constitute one continuous main line, with or without branches, and in case such lease or purchase shall be made by a foreign corporation, such corporation shall have and possess the same rights, powers and privileges, and be subject to the same duties, obligations and liabilities, in respect to the railroad so leased or purchased, as the corporation from which such lease or purchase shall have been made.
>
> *Provided further*, that any railroad so purchasing or leasing shall be subject to any law of this State now in force, or hereafter enacted, relating to taxation of the property so leased or purchased.
>
> *Provided*, in case such lease or purchase shall be made, or such ownership or control had, by a

foreign corporation, the same shall not be deemed complete or effectual for any purpose, until such foreign corporation shall have first complied with all laws of this State pertaining to foreign corporations.

Provided further that no railroad corporation shall consolidate with, lease or purchase, or in any way become owner of or control, another railroad corporation, or any stock, franchises, rights, or property thereof, which owns or controls a parallel or competing railroad, to and with the railroad owned or controlled or operated by such leasing or purchasing railroad corporation; and the question whether any such railroads are parallel or competing lines, shall, when demanded by the party complaining, be decided by a jury, as in other civil actions.

A comparison of the last proviso with the previous legislation on the subject shows that it was based on this legislation, covers the same ground and the whole of it, with the additional prohibition where a road is merely "operated" by the purchasing company. This act, therefore, supersedes the former legislation, for which it is a substitute.

(6)

The scope and meaning of these enactments are too plain to admit of question. They deal wholly with railroad corporations (even the act of 1874 goes no farther than to forbid "the lessees, purchasers or managers of any railroad corporation") and (in respect of office-holding) the officers of competing railroad corporations.

They nowhere forbid the shareholders or any of them in one railway company from purchasing a part or even the whole of the shares of a competing company.

Section 3 of the act of 1881 forbids a "*railroad corporation*" from purchasing or in any way becoming the owner of stock in any competing railroad company. It cannot hold *even a single share*, "Railroad corporation" does not mean stockholder or even all the stockholders in a railroad corporation, nor does it mean any other corporation than a railway corporation. To hold otherwise would violate the rudimentary principles of construction—would be to legislate and not to construe. And if "railroad corporation" in this section means an individual or a combination of individuals, or a corporation other than a railway company, then no individual or insurance or investment company nor any charitable society holding one share in a railway company, can acquire, by gift, purchase or bequest, a single share in a competing company. And if "railroad corporation" means individual, means every kind of corporation, then the act forbids any individual or corporation from acquiring one share of stock in any corporation if it already holds one share in a competing company.

True, the act is limited to owning stock in a railroad corporation, and a railroad corporation owning or controlling a parallel or competing line. But, if the "railroad corporation" which is forbidden to *purchase* means also individuals, means corporations of every sort, the same term must have the same enlarged meaning in the description of the thing forbidden to *be purchased*. If it be objected that in this last clause the description is limited to railroad corporations *owning or controlling a parallel or competing line*, it is enough to say that a construction that turns individuals and investment companies and charitable and educational societies into railroad companies where

they are buying stock, can have no difficulty in enlarging railroad corporations with competing lines into any desired variety of corporations with or without lines.

Such is the necessary result of the construction—or rather the legislation—asked by plaintiff, and by which it claims that in each case a great evil—the owning of stock by anybody, individual or corporate, in competing companies of any kind, and the suppression of competition to which such ownership (even of one share) necessarily tends—will be struck down, and the great policy of the common law vindicated.

True, such construction makes a law the legislature never passed, and, so far as appears, never thought of passing. But then, as plaintiff says, the legislature probably would have passed such a law if they had thought of it; and any one buying shares in two competing railway companies must have known that he was evading a wholesome and salutary statute which the legislature would certainly have enacted if it had occurred to them to do so.

If the legislature had intended to include individuals, or corporations other than railway companies, in the prohibition directed against those companies, it would have done so in plain terms. It designates, in the act of 1874 "railroad corporations" and their "lessees, purchasers or managers," and forbids them, and them only, to lease or purchase the works or franchises of, or in any way control any competing company.

The insertion of the two words "or stockholders" (which would include corporate as well as individual stockholders) was all it needed to do to express

the intention now claimed for it by the state; and it is hard to conceive that it had the intention and yet refrained from so easy an expression of it.

The prohibition in the act of 1881 is directed *solely to the railroad company:* "No railroad corporation shall consolidate with, lease or purchase or in any way become owner of * * * any other railroad corporation or any stock * * * thereof, * * * which owns or controls a parallel or competing line."

Here again the words "or any of its stockholders," or like words, after the words "No railroad corporation," could not have been omitted had the legislature intended to include the stockholders in the prohibition.

The act of 1899, which really supersedes the earlier laws on this point, is also limited to corporations. It forbids a *railroad corporation* to buy, own or control *a single share* of a company having a parallel or competing line. If it is aimed at purchases by individuals, or by other than railroad companies, then no individual or investment company, or charitable or educational corporation, owning one share in the Great Northern Co. can buy or "in any way become owner"—not even by bequest—of a single share in the Northern Pacific Co.

But if the legislature had had any such intention, they would certainly have expressed it by designating stockholders and corporations generally as objects of the prohibition.

The position now taken by the state assumes that the legislature intended all that would have been expressed had these words "stock" and "stockholders" been used. That is that the legislature sup-

posed that "railroad corporation" meant every individual, every combination of individuals, every sort of corporation that might attempt to acquire, or was liable to receive by gift or bequest, stock—one share or many—in two competing railway companies. But there is no ground for imputing to the legislature so unwarrantable an amount of stupidity—an amount verging on monopoly. And a construction that necessitates such an imputation must be rejected.

(7)

If any doubt could remain that these laws contain no limitation of the right of corporations other than railway corporations to own stock, the legislature of Minnesota, as if to settle that doubt, passed chapter 86 of the laws of 1903, which reads as follows:

> "An act to prohibit the consolidation of capital stock, lines, property, franchises, control, or the power of control, of parallel or competing lines of railroad."

"*Be it enacted by the Legislature of the State of Minnesota.*

> "SECTION 1. The consolidation of the capital stock, lines, property, franchises, control, or the power of control, of two or more parallel and competing lines of railroad in the hands of any corporation, trustee, agent or representative of any corporation, wheresoever situated, is hereby prohibited and made unlawful.
>
> "SEC. 2. This act shall take effect and be in force from and after its passage."

This law was passed since this suit was brought, and so it may be presumed that its language, hardly less vague than that of the Act of 1874, was intended to

prohibit such purchases as that here in question. If this be so, the act is a legislative declaration that the prior statutes will not bear the interpretation which plaintiff seeks to place upon them in this suit. For if prior statutes covered the subject, why pass this statute? The case is as if this statute contained an express recital that there was no existing law covering the ground. And while the legislature cannot conclusively determine the meaning of prior laws, this being for the court, still where the meaning of a prior law is doubtful, legislators' interpretation as evidenced in other laws is of the highest value and entitled to great weight.

(8)

In this case all the acts complained of have been acts of the shareholders alone, and of a part only of the shareholders.

The original "combination" was formed by men holding not to exceed 35 millions of the 125 millions of the Great Northern capital stock, and 41 millions of the 80 millions of common stock of the Northern Pacific Co., whose capital also included 75 millions of preferred stock, with the same voting power as the common.

This was the aggregate holding of all those who can be said to have been in any way concerned in the "combination" at the time the Securities Co. was formed. Soon after the formation of the Securities Co. and its purchase of the "Harriman stock," the combination transferred to it no more stock than they owned and could transfer—that is, not exceeding 28 per cent of Great Northern, and 27 per cent of Northern Pacific.

These transactions of shareholders, dealing solely with their own shares, were no more acts of either railway company than any other transfer of shares by individual shareholders to other individuals or to corporations.

Besides its purchase of the Harriman shares and shares held by its promoters, the Securities Co. made other large acquisitions of shares. In case of each acquisition it dealt with the seller directly and separately. The "combination" took no part in these transactions whether by urging or advising the holders to sell, or otherwise.

Here, too, the transactions were wholly between shareholders, with which the railway companies had nothing to do. And they were transactions which in no way affected the railway companies, or their franchises or powers or the exercise of either. Whether one set of persons or another holds a majority of the stock and so controls the corporations, and any transfer of stock by which such control may pass from one set of persons to another, are matters wholly for the persons engaged in them and with which the corporation has no concern. Certainly, the acts of less than the whole of the shareholders, relating wholly to the sale and purchase of stock, and in no wise imputable to the corporation.

And in this case there is direct and uncontradicted evidence that the railway companies took no part in any of these transactions (Mr. Hill, 121, 947; Mr. Mellen, 601–2, 1031).

(9)

And so this case is not within the series of recent cases in the state courts, which have been supposed to

hold that the action of *all* the stockholders separately, and not at a corporate meeting, is the action of the corporation—and this on the theory that the corporation is the body of the stockholders; that the artificial person chartered by the state is a mere fiction of law, and not a person at all; that it is the stockholders who do the business in the corporate name, (as they do in a partnership,) or through the corporation as a mere agent. But even these cases do not hold that the action of less than *all* the shareholders is imputable to the corporation. Nor do they hold that action even by all the shareholders, unless at a corporate meeting, is imputable to the corporation, where the subject matter of it is not business of the corporation, where it does not deal with the property or business of the corporation, but solely with the individual property of such shareholders, whether such property be shares of stock or anything else. This heresy has never been adopted or tolerated by the courts of the United States. If it is the stockholders, and not the corporation as a person distinct from them who carry on the business, how can a state exclude citizens of another state, and incorporated there, from carrying on an insurance business or any other not interstate business within her limits, which she permits her own citizens to carry on in a corporate name? What becomes of *Paul v. Virginia*, 8 Wall., and the many other cases that establish the right of a state to exclude foreign corporations though composed of citizens of sister states, on the ground that each such corporation is a distinct person from its shareholders, and that the business is that of the corporation and not of the shareholders and is carried on by the corporation and not by the shareholders?

In *Briscoe vs. Bank of Commonwealth*, 11 Pet., 257, the defendant was chartered as a bank of issue by the State of Kentucky, by its charter all its shares were to be (and they always were) held by the state, but without any payment for them. The bank issued its circulating notes, whose currency and credit necessarily depended wholly on the credit of the state. The court held that such notes were not "bills of credit" of the state, within the inhibition of the constitution, because, and only because, issued by and in the name of the corporation, and therefore not issued by the state, its sole stockholder.

The distinction has always been adhered to, in whatever form the question has been presented. From among many cases we cite:

U. S. Bank vs. Planters Bank, 9 Wheat. 904, 907.

Briscoe vs. Bank of Commonwealth, 11 Pet. 257, 323-6, 326-7.

Darrington vs. State Bank of Alabama, 13 How. 12, 15-17.

Curran vs. State of Arkansas, 15 How. 304, 309.

Van Allen vs. Assessors, 3 Wall, 584.

Paul vs. Virginia, 8 Wall. 168.

Delaware Railroad Tax, 18 Wall. 206, 229-231;

Gottfried vs. Miller, 104 U. S. 101, 128.

Pullman's Palace Car Co. vs. Missouri Pacific Ry. Co., 115 U. S. 587.

Gibbons vs. Mahon, 136 U. S. 549.

Humphreys vs. McKusick, 140 U. S. 304, 312.

Owensboro Nat. Bank vs. Owensboro, 173 U. S. 664, 676-683.

Cleveland Trust Co. vs. Landers, 184 U. S. 111, 115.

Morgan vs. Railroad Co., 1 Woods, 15; 17 Fed. Cas. No. 9806, per BRADLEY, J.
American Preservers' Union vs. Norris, 43 Fed. Rep. 711, per THAYER, J.
Central Trust Co. vs. Bridges, 57 Fed. 753 (6 C. C. A. 539).
Richmond Construction Co. vs. Mo. Pac. Ry. Co., 68 Fed. 105 (15 C. C. A. 289).
Fitzgerald vs. Mo. Pac. Ry. Co., 45 Fed. 812.
Baldwin vs. Canfield, 26 Minn., 43.
Winona & St. Peter R. Co. vs. St. Paul & Sioux City R. Co., 23 Minn. 359.

(10)

To overcome these obstacles to bringing the acquisitions of shares by the Securities Co. within the inhibition of the consolidation acts, it is charged (par. XVI, p. 35*a*) that the Securities Co. "is a railroad corporation, within the meaning of the laws of this state." This is an admission that it is only ownership of shares of one or two competing *railroad* companies by the other that is forbidden. But it is absurd to say that the Securities Co., which has absolutely no power to build or operate a railway, is "a railroad corporation," or one of two competing railroad corporations, within the meaning of the Minnesota law or any other possible meaning. Indeed, it is perfectly well settled in Minnesota that the character of any corporation, whether railroad or manufacturing, etc., depends wholly and solely on its charter or articles of incorporation and the purpose therein stated. If by those articles it is solely an investment and financial company, it would

not become a railway company though it should, acting *ultra vires* of its articles, build or operate railways. *Senour Mfg. Co. vs. Church Paint Co.*, 81 Minn. 294.

And so these consolidation acts when they mention railroad corporations mean those chartered or incorporated as such, and no others.

(11)

To overcome the same difficulty, the bill also charges (par. XI, p. 25*a*, fol. 100) a purpose on the part of the combination to "*evade*" these consolidation acts.

The two decisions of this Court about to be cited are a sufficient answer to this charge.

The statute forbids the doing of specific things by designated persons. The argument is, we suppose, that the laws were passed in pursuance of a general policy to prevent a single control by two competing railroad companies, and that the acquisition by the Securities Co. is within the mischief and the spirit of the law, and hence, though not within its terms, is an *evasion* of it.

But the only policy of the state which the court can recognize is that expressed in its statutes. Those statutes do not forbid every means by which a single interest may acquire control of two competing companies. They forbid such control of one railroad company by a competing railroad company, and forbid that only, and the policy of the state goes no farther than the statute. That policy we have already discussed.

Again, when a statute does not forbid results however reached, and does not forbid whatever acts

may effect such results, but merely forbids specific acts, it is no evasion of the statute to do acts other than those forbidden, though they effect and be intended to effect, such results.

It is *ultra vires* and hence illegal, even where it is not expressly forbidden, for a corporation to transfer its charter and franchises. But this does not prohibit the shareholders from selling all the stock to persons desirous of acquiring the charter. This act of the shareholders is lawful and not an evasion, though it produces the same result as the act which is forbidden.

The internal-revenue act required all bank checks to be stamped, under penalty. Receipts for sums under a certain amount did not require stamps. In lieu of drawing checks, and to avoid payment of the stamp tax, not a few depositors would present unstamped receipts to the bank for the amounts which they wished to draw. The receipt served the purpose of a check, it was used in the place of a check, it was so used to avoid the stamp tax imposed on checks, but its use was not an evasion of the act, because the act required checks to be stamped, and a receipt was not a check and so not required to be stamped. *U. S. vs. Isham*, 17 Wall. 496, 506; *Com. vs. New York, L. E. & W. R. Co.*, 132 Pa. 591 (19 Atl. 291). And see *Austin vs. Tennessee*, 179 U. S. 343, 383, per BREWER, J.

In the acts of the Securities Co. and its promoters there has been no subterfuge, no concealment. The real transaction is just what it appears to be. On its face it is either within the statutes or without them. The notion that to do a thing not forbidden by a statute, but which may produce the same result as the doing of the thing which is forbidden, is an

"evasion" of the statute, and is somehow prohibited by it as the doing indirectly of what the law forbids directly, is responsible for a good deal of loose argument and decision.

It has recently received its quietus in England by decisions of the House of Lords and Privy Council. *Sullivant v. Atty. Gen. of Victoria* (1901), A. C. 196; *Simms v. Register of Probates* (1900), A. C. 323.

(12)

In this case, at least, all questions under these consolidation acts are set at rest by two decisions of this court.

In *Pearsall v. Great Northern Ry. Co.*, 161 U. S., 646, it was a question whether the purchase of one half of the shares of the Northern Pacific Co. was a purchase by the Great Northern Co. or by its shareholders, and whether, in either case, it was forbidden by the acts in question. The court held that if the purchase were by the Great Northern shareholders, it would be valid, saying (p. 671):

> "Doubtless these stockholders could lawfully acquire by individual purchases or majority or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests as such in common."

But the court held that the purchase was really by the Great Northern Co., which paid the entire consideration, and was, therefore, unlawful.

The question decided in the passage quoted was

much a question in the case, calling for a decision, as any other that was decided in it.

At the same time with the Pearsall case was decided *Louisville & Nashville Ry. Co. vs. Kentucky*, 161 U. S. 677. In that case the question was upon the purchase by the railway company of a parallel and competing line of railway, at a judicial sale. Upon the question here involved the court say (p. 693) :

> " It is true, as was observed in *Pearsall v. The Great Northern* that the stockholders of the L. & N. Co. may individually become the purchasers of the Chesapeake Co. at a judicial sale, and may organize a new corporation, but it would still be a corporation separate and distinct from that of the L. & N. Co. The inhibition of the constitution is not against the sale to individuals though they may chance to be stockholders in a competing line, but against the acquisition by a railway, in any form, of a parallel and competing line. If this could be evaded by going through the form of a judicial sale, the constitutional provision would be of no value."

Having, as thus declared, the right to buy as individuals, and then form a corporation, why may not the purchase be lawfully made in the first instance by a corporation formed for that purpose by those same individuals?

The State directly intervened in the *Pearsall Case*, and by its attorney-general took part in the argument in this Court (See 161 U. S. 653).

Had it afterwards questioned the correctness of the construction placed by the highest court in the land upon its statutes, or had it considered that, as construed by that court, they failed to effect the purpose or reach the end for which they were enacted, it would certainly have remedied, for future cases, that supposed error of the court, or that actual

defect in the statutes. It would, by appropriate legislation, have enlarged the prohibition which the court held was limited to purchases by a competing railway corporation, so as to make it include purchases by the stockholders of such corporation.

But the State did nothing of the kind. From 1896 to 1899, it tacitly acquiesced in the construction given to the statutes by this Court, and made no change in its legislation by amendment of those acts or otherwise. In a somewhat similar case where a decision of the Minnesota Supreme Court on a doubtful statute was questioned three years later in the same court, the court say that its former decision must have become generally known throughout the state, and add:

> "Yet in none of the several sessions of the legislature which have been held since this effect was given to the statute has it been changed in this particular, although several amendments have been made. It is fair to assume that if, in the administration of the law, the intention of the legislative department in so important a matter was being thus misinterpreted, such amendment would have been made as would have made the intention clear."
>
> Tripp vs. N. W. Nat. Bank, 41 Minn., 400, 402.

And on this ground the court adhere to its former construction as having been in effect sanctioned by succeeding legislatures.

But in this case, there has been more than mere tacit acquiescence and sanction.

In 1899 the legislature amended the act of 1881, by an act, already quoted, in terms embracing the whole subject of the purchase of the property or stock of

competing railway companies, and which must therefore, as already pointed out, be taken to supersede all former legislation on that subject.

In this act, the legislature, so far from extending to stockholders the prohibition contained in the former acts, (and which had been held in the Pearsall Case not to include stockholders—no matter how many of them—but the corporation alone) re-enacts the prohibition in the very terms which the Supreme Court had held not to include stockholders.

In thus enacting this statute in the very terms of former acts which had been construed by the Supreme Court in a suit to which the State itself had in that court been a party, the legislature did more than to tacitly acquiesce in the construction of the earlier statutes by the court in that case. It re-enacted the provisions of the earlier statutes in the very terms which the Supreme Court had construed. It re-enacted them *as thus construed*. It re-enacted the construction as well as the words construed, and adopted and affirmed that construction.

And so the decisions quoted are controlling here, not merely as decisions of the highest court, but as part of the very statute which the court is here called on to enforce.

> "It is a common learning, that the adjudged construction of the terms of a statute is enacted, as well as the terms themselves, when an act, which has been passed by the legislature of one state or country, is afterwards passed by the legislature of another. So when the same legislature, in a later statute, use the terms of an earlier one which has received a judicial construction, that construction is to be given to the later statute. And this is manifestly right. For if it were intended to exclude any known construction of a

previous statute, the legal presumption is that its terms would be so changed as to effect that intention."

Com. vs. Hartnett, 3 Gray, 450, 451, per METCALF, J.

"Where a known statute has been re-enacted in terms, its interpretation will be presumed to have been also adopted by the legislature."

Harrington vs. Smith, 28 Wis. 43, 67, per DIXON, C. J.

And see

Willis vs. Eastern Trust Co., 169 U. S. 295, 307–8.

Duramus vs. Harrison, 26 Ala. 326, quoted with approval by BRADLEY, J., in McDonald v. Hovey, 110 U. S. 619, 629.

So this was long since held and has always been the law in this State.

In *McNamara v. Minn. Cent. Ry. Co.*, 12 Minn., 269 (388) an attempt was made to obtain for certain statutory sections incorporated and re-enacted in the General Statutes of 1866, a different construction from that previously given them. This the court refused, saying (by WILSON, C. J.):

"This view would also be contrary to the settled practice and holding of the courts ever since the adoption of the Revised Statutes of the territory; and the legislature, in adopting these sections and incorporating them into the General Statutes, cannot be presumed to have used the words in a different sense from that given to them before the revision."

It is true that since this suit was brought, and in the present year, the legislature has changed the statutes, so as to include purchases by shareholders. This merely shows, as already pointed out, that the legisla-

ture of 1903 deemed it wise to include stockholders, and that it did not consider stockholders to be included in the existing law. It did just what the legislature of 1897 or 1899 or 1901 would have done had any of them been dissatisfied with the then existing law as construed in the Pearsall Case. And this confirms our argument that the failure of former legislatures to do what was done by that of 1903, (to say nothing of the affirmative action of that of 1899), shows that their views of policy were not the same as those of the legislature of 1903. They were satisfied with the law as construed by the Supreme Court, and so did not make the change which they, as well as the legislature of 1903, knew perfectly well must be made should it be deemed proper to prohibit stock purchases in one competing railroad company by the stockholders of another.

(13).

As against the construction of these acts according to the plain meaning as well as the judicial construction of their terms, the State urges that its own policy requires or at least permits an opposite construction—such policy being alleged in paragraph X of the bill of complaint. It has been shown that so far as the statutes of the state show any policy, it is the opposite of that claimed by it as applicable here. And in any case, as said by Justice FIELD, speaking for this Court, in *Hadden v. The Collector*, 5 Wall. 107, 111 :

> "What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing upon which all sorts of opinions, each variant from the other, may be

> formed by different persons. It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes."

The foregoing passage is quoted with approval in *Bate Refrigerator Co. v. Sulzberger*, 159 U. S. 1, 37. In that case the court, construing a statute in language less clear than those here involved, says (p. 36):

> "In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress."

And then, after quoting the above passage from *Hedden v. The Collector*, the Court quotes as follows from *Scott v. Reid*, 10 Pet. 524, 527:

> "Where the language of the act is explicit there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. * * * It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

(14)

Taking appellant's own view of the various acts, granting that the purchase of the majority of shares of a railway company *ipso facto* converts such purchaser into the railway company itself, as well as makes him a purchaser and manager of it—still there is nothing in the Act of 1874, or in the subsequent acts which in any way affects the right of the Securities Co. to make its

purchaser of Northern Pacific shares or to hold the shares so purchased.

The appellant's contention admits that prior to its purchase of *any* railway shares, indeed prior to its purchase of *a majority* of the shares of some railway company—the Securities Co. was not itself a railway company, or the purchaser, lessee or manager of any railway company.

This being so, it had the clear right to buy any or all the shares of any one railway company.

And if, having bought a majority of shares in one railway company, it thereby became that company or a purchaser, lessee or manager of it, the Securities Co. should thereafter buy shares in a competing company, such last purchase, even if forbidden by the acts under consideration, could not affect the validity of the earlier one.

A title to property lawfully acquired cannot, nor can the right to hold such property, be defeated or impaired by a subsequent and unlawful purchase of other property.

Even if lawful, the later purchase could not affect the earlier, and if unlawful and hence void, this would be an additional reason why it could not do so.

Now the first acquisition made by the Securities Co. was its purchase of the seventy-eight millions of Harriman stock in the Northern Pacific Co., on November 18th, five days after its organization.

At the time of this purchase the Securities Co. held no railway stock at all, and hence had a clear right to buy, and was not forbidden to do so by any of the acts.

If these acts forbade the subsequent purchase of any Great Northern shares whatever, or if any in excess of

one-half—that is of a majority—then to the extent of the prohibition any subsequent purchase of Great Northern shares would be unlawful.

But up to the prohibited limit, the Securities Co., though already the owner of a majority of Northern Pacific shares, might lawfully buy Great Northern shares.

And any such subsequent purchase of Great Northern shares would not preclude the Securities Co., already holding a majority of Northern Pacific shares, from continuing its purchases of the shares of that company.

It follows that the Securities Co.'s right to its Northern Pacific shares is not and cannot be in question in this suit.

B. The Anti-Trust Law.

(Laws 1899, C. 359).

SECTION 1. Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this state, or in restraint of trade or commerce between any of the people of this state and any of the people of any other state or country, or which limits or tends to limit or control the supply of any article, commodity or utility, or the articles which enter into the manufacture of any article or (of) utility, or which regulates, limits or controls or raises or tends to regulate, limit, control or raise the market price of any article, commodity or utility, or tends to limit or regulate the production of any such article, commodity or utility, or in any manner destroys, limits or interferes with open and free competition in either the production, purchase or sale of any commodity, article or utility is hereby prohibited and declared to be unlawful.

That when any corporation heretofore or hereafter created, organized or existing under the laws of this state, whether general or special, hereafter unites in any manner with any other corporation wheresoever created, or with any individual, whereby such corporation surrenders or transfers, by sale or otherwise, in whole or in part, its franchises, rights or privileges or the control or management of its business to any other corporation or individual, or whereby the business or the management or control of the business of such corporation is limited, changed or in any manner affected, and the purpose or effect of such union or combination is to limit, control or destroy competition in the manufacture or sale of any article or commodity, or is to limit or control the production of any article or commodity, or is to control or fix the price or market value of the material entering into the production of any article or commodity, or in case the purpose or effect of such union or combination is to control or monopolize in any manner the trade or commerce, or any part thereof, of this state, or of the several states, such union, combination, agreement, arrangement or contract is hereby prohibited and declared to be unlawful.

SEC. 2. Every person who shall either directly or indirectly make any such contract, agreement or arrangement, or enter into any such combination, conspiracy or trust as defined in section one (1) of this act, shall be guilty of a felony and, on conviction thereof, shall be punished by a fine of not less than five hundred dollars ($500) nor more than five thousand dollars ($5000), or by imprisonment in the state's prison for not less than three (3) years nor more than five (5) years.

SEC. 3. Any corporation heretofore or hereafter created, organized or existing under the laws of this state which shall hereafter either directly or indirectly make any contract, agreement or arrangement, or enter into any combination, conspiracy or trust as defined in section one (1) of this act, shall, in addition to the penalty prescribed in section two (2) of this act, forfeit its charter, rights and franchises, and it shall thereafter be unlawful for such corporation to engage in business, either as a corporation or as a part of any

combination, trust or monopoly, except as to the final disposition of its property under the laws of this state.

Any corporation organized under the laws of any other state, territory or country, which is now located or which may hereafter be located within this state, and engages in the manufacture, production or sale of any article therein which shall either directly or indirectly make any contract, agreement or arrangement or enter into any combination, conspiracy or trust as defined in section one (1) of this act, shall, in addition to the penalty prescribed in section two (2) of this act, be prohibited from doing any further business in this state, except as to the final disposition of its property under the laws of this state.

SEC. 4. Any contract by any person, partnership, association or corporation, whether domestic or foreign, made in conducting business contrary to the provisions of section one (1) of this act, shall not be enforced in any court of this state in favor of such persons, partnership, association or corporation.

SEC. 5. Any person who shall enter into any correspondence, negotiations or agreement in this state, or who shall, being a resident of this state, go into another state, territory or country for the purpose of entering into any negotiations or agreement which tend to the formation of any contract or combination forbidden by this act, shall be guilty of a felony, and be subject to all the penalties of this act.

SEC. 6. That for the purpose of carrying out the provisions of this act, any citizen of this state may, and it is hereby declared to be the duty of the attorney general, to institute, in the name of the state, proceedings in any court of competent jurisdiction against any person, partnership association or corporation who may be guilty of violating any of the provisions of section one (1) of this act, for the purpose of imposing the penalties imposed by this act, or securing the enforcement of section three (3) hereof. *Provided*, that when such proceedings are instituted by any other than the attorney general, the state shall not be in any manner liable for the costs or for any of the expense of such proceedings. And *provided*,

further, that when the attorney general deems it necessary, he is hereby authorized to employ counsel to assist in the prosecution of any action brought under the provisions of this act.

Sec. 7. The word person as used in this act shall be construed to include any corporation or association formed or existing under any law of this state or any other state or country.

Sec. 8. This act shall take effect and be in force from and after its passage.

Approved April 21st, 1899."

(1)

This act is strictly a criminal law. Every act which it forbids is made a crime. Every violation of the act is a felony.

In view of the provisions of sections 2 and 5 it requires the strictest of strict constructions.

So far as the bill in this case is founded on this act, it is a bill by the sovereign to prevent and restrain the commission of felonies, as such.

In the absence of a jurisdiction therefor expressly given by statute, a court of equity has no jurisdiction to prevent or restrain the commission of crimes as such.

It is true that in the bill the State alleges threatened injury to itself as a land-owner and shipper, but the evidence wholly fails to make a case on this ground, as has been already pointed out. The suit therefor cannot be maintained in the absences of express statutory authority.

No statute other than the act itself is produced to show such authority, and the act wholly fails to give it.

Sections 2 and 5 impose penalties of fine and imprisonment for violations of the act. Section 3 im-

poses on corporations violating the act the penalties of Section 2 (fine and imprisonment) and also forfeiture of their charters, and disability to carry on business.

Section 6, and that only, provides for suits to enforce the law. Under this any one may, and the Attorney-General must, " institute, in the name of the State, proceedings in any court of competent jurisdiction against any person, partnership, association or corporation who may be guilty of violating any of the provisions of section one of this act, for the purpose of

" (1) Imposing the penalties imposed by this act " —(that is, a criminal prosecution, for no penalties except fine and imprisonment are imposed for violations of section one).

" (2) Or securing the enforcement of section three hereof "—that is, by the forfeiture of the charter of the offending corporation, and preventing its continuance in business, if a domestic corporation, and prohibition, if a foreign corporation, to do further business in the State.

This suit is not brought for any such relief, nor could any such be given by the Court, and hence the suit cannot be maintained on this act. And the Circuit Court was clearly right in so deciding (119*a*, fol. 474).

(2)

The transactions complained of are not within the Anti-trust Act.

1. The only provisions of that act that can be claimed to apply to them are those at its beginning making illegal " any contract, agreement, arrangement or conspiracy, or any combination in the form of a trust or

otherwise, hereafter entered into which is in restraint of trade or commerce within this State, or in restraint of trade or commerce between any of the people of this State and any of the people of any other State or country."

This is substantially a copy of the Federal Anti-Trust Act. We have so recently and so fully argued, both orally and in briefs, the point that purchases and sales of stocks or other property among competitors, or between competitors and a third person or corporation, though resulting in an extinction of competition, are not in restraint of trade at common law or within the Federal Anti-Trust Act; that any extinction of competition, or any power to suppress competition, that may result is an incident of the single ownership of what was before owned by competitors, and is not caused directly or immediately by the contract, combination or conspiracy, if any, for making the sale; that we do not feel justified in imposing upon the Court a repetition of that argument.

We wish, however, to call attention to the admission by appellant in its brief (quoted, *supra*, p. 17) of what is abundantly proved by the evidence; viz., that the promotors of the Securities Co. never agreed, combined or conspired to transfer, or procured to be transferred to it, or to help it obtain, any Great Northern shares in excess of the 33 millions held by themselves; that is, their conspiracy did not extend to the acquisition by the Securities Co. of the control, or power of control, of any kind, of two competing companies, and so could not possibly be a conspiracy in restraint of commerce.

And on the point that the purchases and sales between the Securities Co. and the shareholders of the

two railway companies were absolute, and that the Securities Co. is the absolute owner of all shares so obtained, and that the company is not a "trust," we refer especially to the company's offer to the shareholders to *buy* their stock, and the form in which the shareholders offered to *sell* their stock (Defts.' Ex. A, pp. 1048–9), to the fact that, of the round sum paid for the Harriman shares $9,000,000 was *in cash*; that the 34 millions of new common stock obtained from the Northern Pacific Co. were paid for in cash. The Securities Co. could hardly be said to hold in trust these shares, bought for cash, and all its shares stood on the same footing as these.

2. The acquisition and holding of railway shares is a matter not within its purview for other reasons.

The act specifies and deals with various sorts of combinations—to limit the supply of commodities, to control or raise the market price of commodities, or to destroy or limit "open and free competition" in either the production, purchase or sale of any commodity or utility."

The objection to the Securities Co.'s holdings of stock is that it suppresses or restrains competition—but competition in transportation. The act specifies in detail just what suppressions of competition it is aimed at, and does not specify competition in transportation. This specific enumeration excludes from the scope of the general words, "in restraint of trade or commerce," combinations where the only restraint is by suppressing or restricting competition. It certainly excludes from the general words those combinations expressly enumerated, and it excludes all other that restrain competition. The mere enumeration would

be enough to exclude the combinations named, and the act itself in terms excludes them, for it denounces any combination "in restraint of trade or commerce, * * * *or* which limits supply or suppresses competition," etc. The act thus classifies the combinations it denounces:

(*a*) Combinations which suppress competition.

(*b*) Combinations which restrain trade or commerce otherwise than by suppressing competition.

And these classes are mutually exclusive of each other. And, by naming what suppressions of competition are forbidden, it excludes all not named.

Again: The first section goes on to define what unions or combinations *of corporations*, and what surrender of franchises or control of its business by one corporation to another, are forbidden, and it forbids all of such specified unions or combinations whose purpose or effect is "to control or monopolize in any manner the trade or commerce or any part thereof, of this state or of several states."

This specific statement of what unions or combinations giving *one corporation* control of another are prohibited, shows that this subject, so far as intended to be dealt with in the act, was intended to be and was dealt with in this *second* half of the section, and that *combinations controlling corporations* were not intended to be included in the general words of the *first* paragraph, "any combination which is in restraint of trade or commerce."

Again: It will be noted that while this section in each of its two paragraphs deals with monopoly and suppression of competition in manufacture, production, purchase and sale of articles, commodities and utilities, it has nothing to say of transportation. This

silence is significant. It means and can only mean that the legislature did not mean to deal in this act, with railways or railway companies.

And there was ample reason for the omission.

The state already has a law covering the whole subject of railways and their operation, with minute and stringent provisions for regulating the business of the companies. And it had a railway commission specially charged with the duty of executing the law, and clothed with ample powers to that end.

And it already had on its statute book the acts before set forth regulating the consolidation of railway companies and the stock ownership in competing lines. One of these acts had been in force 25 years, another nearly 20 years. The last of them was passed at the same session with the Anti-trust Act, was pending at the same time, and was approved by six days earlier.

When passing this last act, the legislature had under consideration the matter of ownership of stock in competiting railway companies and what restrictions should be imposed upon it. And it determined to re-enact in substance the former laws, and to re-enact them in their natural place—in the place in which all prior legislation on the subject had been enacted—viz: in an act relating to railway companies alone. And in this it followed the unbroken practice of legislatures in this state, viz: to keep its railway legislation by itself, and not confused with legislation on other subjects.

This action of the legislature is of itself conclusive that it did not mean to include in the indefinite mass of subjects of the Anti-trust Act the matter of railway stock ownership, as to which it was at the very time legislating in an act confined to railway companies.

In view of all these considerations, of the enumeration in the act of the subjects covered by it, the unbroken course of legislation in dealing with railways and railway companies by themselves and as separate subjects of legislation, the concurrent passage of another act on the subject of railway stock ownership, the legislature, if it had meant to deal with this subject in the Anti-trust Act, to add it to those specifically named, would have done so by specifically naming it, and not have left the matter of regulating the stock ownership and the operation of railway companies to depend on the varying meaning the courts might give to the word "any."

3. In these particulars and grounds for construction, the state anti-trust law is widely different from the federal law.

The federal law contains no enumeration or specification of subjects within its operation—furnishes no ground for applying the maxim *expressio unius est exclusio alterius.*

The federal law was held applicable to railway traffic contracts on the ground, among others, that if it did not apply to railways there was little left for it to operate on. *U. S. vs. Freight Association,* 166 U. S., 290, 313, 326.

The subject-matter (railway traffic contracts, in the first two of the federal cases, and combination of dealers in the third) which the supreme court held embraced within the federal law, was not embraced in any other congressional legislation. Here, the subject of railway consolidation or stock ownership of competing companies has for a generation formed a separate branch of state legislation which has covered

as much of it as the legislature thought necessary to cover, some of that legislation being strictly comtemporaneous with the anti-trust act.

These differences between the federal and the state anti-trust act require the latter to be constructed, in this particular, by rules that were properly held inapplicable to the former.

4. The combination is not within the Ante-trust Act for another reason. It was not formed within the state. The agreement to form the Securities Co. was made in New York. The company was formed in New Jersey. It was not formed to do anything in Minnesota, nor was it required to do anything there. All its stock purchases were made in New York, and the transfers to it were made in New York, where the transfer books of both railway companies have always been kept. (Mr. Clough, 1044–5).

It is elementary that the laws of a state have no extra territorial operation, and they must always be construed as not intended to have any such operation. Above all is this true of its penal laws. This Anti-trust law is a highly penal act, the 5th section absurdly so. The act can be valid only so far as its operation is confined to this state, and so the legislature must have meant to prohibit and declare unlawful combinations formed in this state and those only. But whatever its intention, it has not made and could not make penal or unlawful the acts of the Securities Co. and its promoters done in the states of New York and New Jersey.

> "Our legislature has no extra territorial jurisdiction, and when it forbids, in unqualified terms,

the doing of an act, it must always be understood that the thing is only forbidden in this state" (*Charles vs. People*, 1 N. Y., 180, 184).

Allgeyer vs. Louisiana, 165 U. S., 578.
In re Grice, 79 Fed., 627, 638.
Clarke vs. Richmond Terminal Ry. Co., 62 Fed., 328, 333–4; 10 C. C. A., 387.
McLaughlin vs. Tuck, 99 Fed., 562.
S. C. (in C. C. A.) 115 Fed., 85.
Flash vs. Conn., 109 U. S., 371, 376–7.

It is needless to say that the foregoing, as well as all of this argument on the Anti-Trust Act, is directed to the intention of the legislature in that act, and to the powers it assumed to exercise by that act. Its powers to enact and enforce its Anti-Consolidation Acts is not drawn in question.

The plaintiff's grievance—the gravamen of the bill—is the acquisition and holding, by the Securities Co. of a large majority of the shares of the two railway companies. There is no evidence that the Securities Co. has taken any part in the management of either road. The claim is that such majority holding of itself and necessarily suppresses competition.

The language of the Anti-trust Act had been construed many times before it was adopted in the Minnesota statute, and the legislature adopted the construction as well as the words. *Warner vs. Texas & Pacific Ry. Co.*, 164 U. S., 418, 423; *Willis vs. Eastern Trust Co.*, 169 U. S. 295, 307–8; *Nicollet Nat. Bank vs. Minneapolis City Bank*, 38 Minn. 85.

The uniform construction by this court has been that "restraint" means "direct restraint," and a "contract or combination in restraint of commerce" means those and those only "whose direct and immediate effect is a restraint upon interstate commerce." *U. S.*

vs. Freight Ass'n., 166 U. S. 291, 313, 341-2; *Joint Traffic Ass'n. vs. U. S.*, 171 U. S. 505, 568; *Hopkins vs. U. S.*, 171 U. S. 578, 592.

This act is therefore limited by its terms to combinations whose "direct, immediate and necessary effect" is to restrain domestic or interstate commerce or both.

6. The defendants insist that the purchase and holding of shares in a railway company, whether a majority or less, does not *directly* affect interstate commerce, and a contract or combination for such purchase and holding does not *directly* affect the commerce of the railway.

The commerce of the company is not carried on by the shareholders, but by the directors. The directors do not derive their powers from the shareholders, but from the charter of the company. They hold for fixed terms. During their terms they are independent of the shareholders, are beyond their control, and cannot be removed by the shareholders even for cause, though the courts on application of the company or shareholders may remove them for cause. And so the stockholders do not control the directors or the commerce of the company. They may have great influence over the directors, but influence is not control. And whatever influence they may have in matters concerning the ordinary and lawful traffic and business of the company, there is no presumption and no ground for holding that any control of the stockholders over the directors extends to compelling or even inducing them to risk fine and imprisonment by violating the anti-trust act, whether by suppressing competition or in any other way.

Our position that the shareholders do not directly

control the directors or the commerce of the road is that of this Court as stated by Chief Justice WAITE in *Pullman Car Co. vs. Missouri Pacific Ry. Co.*, 115 U. S. 587, 596-7; *Porter vs. Pittsburg Bessemer Steel Co.*, 120 U. S. 649, 670, and of *Hoyt vs. Thompson*, 19 N. Y. 207, 216 per COMSTOCK, J.; *Burrill vs. Nahant Bank*, 2 Met. 163, per SHAW, C. J.; *Nat. Bank of Commerce vs. Allen*, 90 Fed. 545; 33 C. C. A. 169 per THAYER, J.

And as the Securities Co. owning a majority of shares of one only of these roads would not directly control its commerce, so it does not control the commerce of both by owning a majority of shares of each. Each railway company has and is required by law to have a board of directors wholly independent of the other. To operate the roads in violation of law by suppression of competition between them or other forbidden practice or agreement requires the concurrent action of two boards of directors to violate the law, and such action is even less under the control of the Securities Co. than would be the action of a single board of directors of one company only.

If we are right in following this court and maintaining that the Securities Co. *does not*, by reason of its stock ownership, *directly control* the commerce of the two railway companies, then such ownership and any combination that may have produced it are not within the anti-trust law, since that is limited to combinations, etc., which act *directly* on commerce.

7. The state legislature is powerless to defeat the right of the Northern Pacific shareholders to sell to the Securities Co. or the right of that company to purchase, for this additional and conclusive reason.

Just as the power to regulate stockholding in the

Great Northern Co. is exclusive in Minnesota, so the power to regulate stockholding in the Northern Pacific Co. is exclusive to its creator, the State of Wisconsin, and for the same reason. The State of Minnesota has no more concern with stockholding in Wisconsin corporation—either to authorize or to forbid—than it has with stockholding in a National bank or in the bank of England. Nothing can be more baseless than a claim by Minnesota to provide by statute who shall and who shall not hold stock in a corporation chartered by Wisconsin.

The bill, however, alleges (par. III.) that by reason of a Minnesota statute, providing for the filing of their articles by foreign railway companies, and its acceptance by the Northern Pacific Co. that company became a domestic corporation in Minnesota, and subject to all its laws and regulations relating to railway companies, and especially to the anti-trust and anti-consolidation laws of that state.

The statute relied on (Gen. St. 1894, c. 34, §§ 2753–4) provides in the first section that a railway company of another state may extend its railway into and operate it within the state, and "shall have all the powers, franchises, immunities and privileges and be subject to the same liabilities as railroad companies organized under the general laws of this state," with the provisos that any company availing itself of the Act shall be subject to payment of a gross-earnings tax to be computed as therein provided, and shall also file a copy of its articles.

The next section (§ 2754) provides that on filing of such articles, "which shall be deemed to be an acceptance of the benefits of this act, the said corporation is hereby declared to be a legal domestic corporation of this State."

It is contended by appellant that under this statute the Northern Pacific Company having filed its articles, has become a Minnesota corporation to the extent that its constitution, composition and internal organization are no longer within the exclusive control of Wisconsin, but may be regulated by Minnesota, and have been regulated by Minnesota laws here in question.

But this position is untenable, for

1. The sections in question are concerned only with the business of the company and its taxation in that state. On any other construction, all the various provisions of the charter governing the constitution and internal management of the corporation, including the amount of its stock, by whom to be held or not to be held, how to be transferred, would be varied by the different and probably conflicting legislation of all the states between Wisconsin and Puget Sound.

2. The State of Wisconsin cannot be shorn of its exclusive power over a corporation of its own creation by any agreement or transaction between the corporation and any third person, whether an individual or a State of the Union. Any agreement by the company to vest in Minnesota any part of the power already vested in Wisconsin must necessarily be *ultra vires* and utterly void.

That no state has power over the organization and internal government of a corporation, though doing business within its territory, yet created by the laws of another state, is held in

Miles vs. Woodward, 115 Cal., 308; 46 Pac. Rep. 1076.

Williams vs. Gaylord (C. C. A.) 102 Fed. 372, 375-6; s. c., 186 U. S. 157, 165.

For this reason, in addition to that given, *supra*—viz., that the Securities Co., having lawfully bought a majority of Northern Pacific stock before buying any Great Northern stock had a right to buy and has the right to hold all the Northern Pacific stock it has acquired—any decree against defendants must be confined to its holding of Great Northern stock.

But the appellant has failed to show anything unlawful in the acquisition or holding of either stock, and so the decree should be affirmed.

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JAMES H. McK

Supreme Court of the United States.

OCTOBER TERM, 1903. No. 433.

STATE OF MINNESOTA,
Appellant,

vs.

NORTHERN SECURITIES COMPANY, et al.,
Appellees.

BRIEF ON QUESTION OF REMOVAL.

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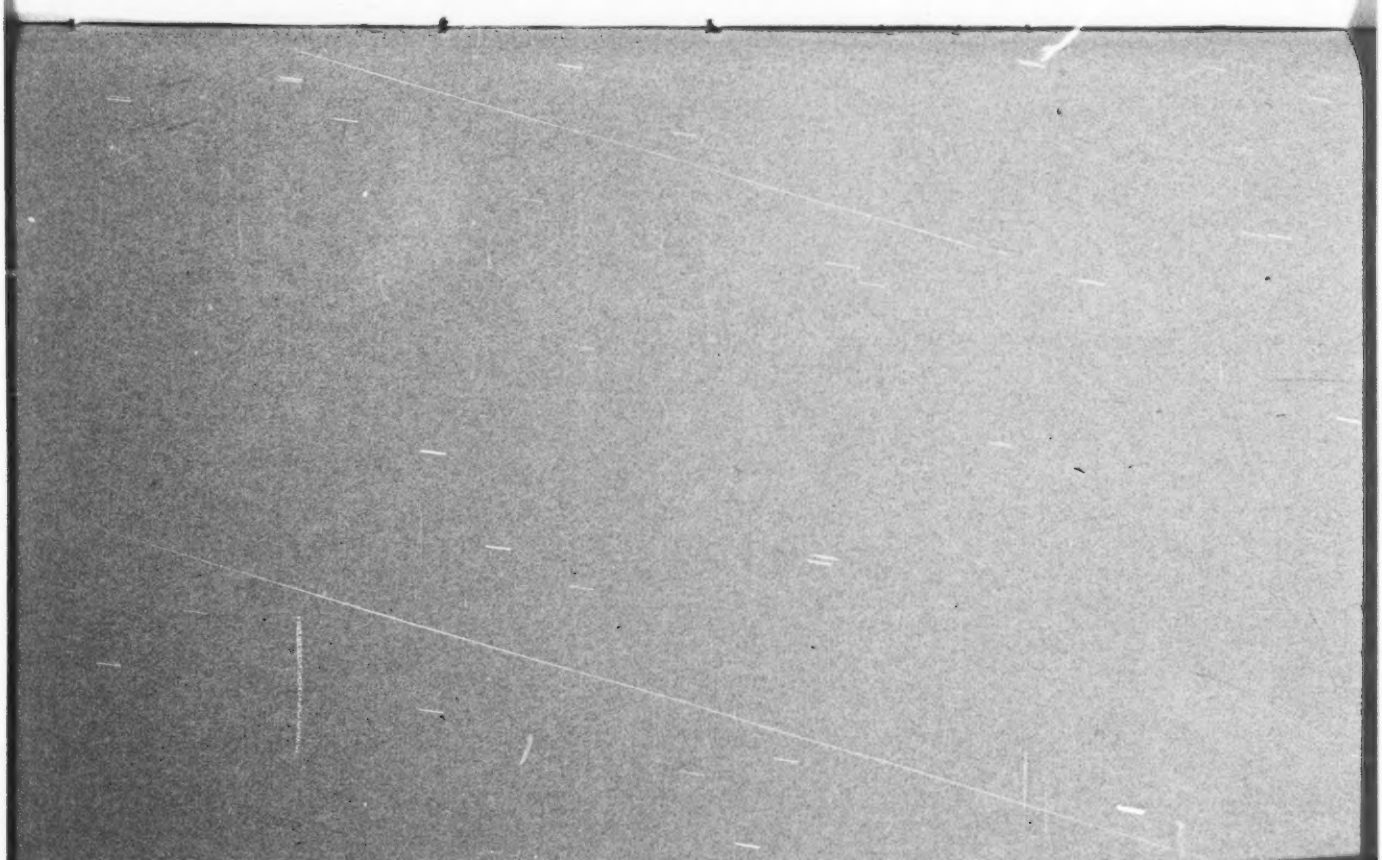

Supreme Court of the United States.

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Appellees.

BRIEF OF APPELLEES ON QUESTION OF REMOVAL TO CIRCUIT COURT.

THE CAUSE WAS PROPERLY REMOVED TO THE CIRCUIT COURT, AND UPON SUCH REMOVAL THAT COURT ACQUIRED JURISDICTION OF IT AS A "SUIT ARISING UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES."

FIRST.

The test of a "Suit arising under the Constitution or laws of the United States."

(1)

Three quarters of a century ago, in a case twice argued, the criterion of a suit arising under the Con-

stitution or laws of the United States was stated as follows by Chief Justice Marshall:

> "A cause may depend upon several questions of fact and law. Some of these may depend on the construction of a law of the United States, others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the Constitution or laws of the United States and sustained by the opposite construction provided the facts necessary to support the action be made out then all the other questions must be decided as incidental to this which gives that jurisdiction. Under this construction, the judicial power of the United States extends effectively and beneficially to that most important class of cases which depend on the character of the cause."
>
> Osborn v. Bank of United States, 9 Wheat. 738, 822.

This criterion of a suit arising under the Constitution or laws of the United States is the same that had already been stated by the Chief Justice and applied by the Court in a case brought into this Court on writ of error to the Supreme Court of a State.

> "A case in law or equity consists of the right of one party as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either."
>
> Cohens v. Virginia, 6 Wheat. 264, 379.

This test, so long ago established, has ever since been recognized and followed, in whatever aspect

and at whatever stage a suit may be brought to a federal court.

It has been quoted in nearly all, and has been the ground of decision in all, of the cases involving the question, whether suits by original process or removed suits.

Among the principal of these cases are:

Gold-Washing Co. v. Keyes, 96 U. S. 199, 201, per Waite, C. J.

Tennessee v. Davis, 100 U. S., 257, 264, per Strong, J.

Railroad Co. v. Mississippi, 102 U. S. 135, 140-1, Per Harlan, J.

Ames v. Kansas, 111 U. S. 449, 462, per Waite, C. J.

Kansas Pacific v. Atchison, R. R., 112 U. S. 414, 415-6, per Field, J. (An original suit).

Pacific Railroad Removal Cases, 115 U. S. 1, per Bradley, J.

Starin v. New York, 115 U. S. 248, 257, per Waite, C. J.

Southern Pacific R. Co. v. California, 118 U. S. 109, 112, per Waite, C. J.

Metcalf v. Watertown, 128 U. S. 586, 588-9, per Harlan, J. (An original suit and an opinion often quoted.)

Shreveport v. Cole, 129 U. S. 36, 41, 43, per Fuller, C. J. (An original suit.)

Beck v. Perkins, 139 U. S. 628, 630, per Harlan, J.

(3)

The foregoing cases were decided under the act of 1875.

In the act of 1887-8, Congress, using the same terms as in the act of 1875, did not mean to use them in any different sense from that already given to them by this Court. On the contrary it re-enacted them as thus construed.

And this Court has never intimated that the criterion declared by Chief Justice Marshall and adopted and applied by itself in so many cases was erroneous in itself or had been rendered inapplicable to any class of cases by the amending act of 1887-8.

The following cases originated after the latter act:

Cooke v. Avery, 147 U. S. 375, 384, per Fuller, C. J. (An original suit.)

Colorado Central Mining Co. v. Turck, 150 U. S. 138, 143, per Fuller, C. J. (An original suit.)

Blackburn v. Portland Gold Mining Co., 175 U. S. 571, 580-1, per Shiras, J. (An original suit.)

Patton v. Brady, 184 U. S. 608, 611, per Brewer, J. (An original suit.)

Swafford v. Templeton, 185 U. S. 487, 494, per White, J.

Northern Pacific Ry. Co. v. Soderberg, 188 U. S. 526, 528, per Brown, J. (An original suit.)

It will be noted that in these cases decided under

the act of 1887-8, the Court not only adopts the same criterion that was applied under the act of 1875, but relies on the cases decided under that act as authority for so doing, and quotes largely from the opinions in those cases.

(4)

It is perfectly true that some removals that were authorized by the act of 1875 are not authorized by the act of 1887-8.

The reason is not any change in the criterion of a suit arising under the Constitution or laws of the United States, but simply a difference in the cases to which the criterion is applied.

Whether a circuit court has jurisdiction of a suit arising under the Constitution or laws of the United States, depends upon the questions raised on the record at the time the suit is brought into the court for its cognizance. This is in accordance with the general rule as to jurisdiction of subject matter.

Under the earlier act the declaration or bill and the answer or petition for removal might form the record presented to the circuit court. Hence cases might on this record present a federal question and so be removable though no such question was presented by the bill or declaration. And so a suit might be removable by plaintiff before answer, his pleading showing a federal question, but would not be removable after an answer admitting plaintiff's entire cause of action, but pleading a release or other matter of avoidance so that the record on removal would no longer present a federal question.

The principle—the *ratio decidendi*—is the same in original and in removed cases, and whether under the act of 1875 or that of 1887-8. The criterion of jurisdiction—the appearance of a federal question on the face of the record—is the same. The only difference is in the records to which the test is applied. Whatever would present a federal question if appearing in a bill and answer in a cause removed after answer under the act of 1875, must equally present a federal question if properly appearing in the bill in an original suit or in a suit removed under the act of 1887-8. By "properly appearing" we mean such as might properly appear in the statement of plaintiff's own case. See instances, *infra*.

The act of 1887-8 allows the removal of those suits only which might be originally brought in the circuit court. For this reason, and because on removal (which must be made before answer) the declaration or bill is the only pleading on which the circuit court is asked to take cognizance of the case, it necessarily follows that the plaintiff's pleading in a removed, as much as in an original suit must show that the case arises under the Constitution or laws of the United States.

And as it is the proper function of the plaintiff's pleading to state his own case and not that of the defendant, it is settled by the cases already cited that to give jurisdiction the federal question must appear in plaintiff's statement of his own case, or of his own claim, and that this is all that is required.

In one or two cases there are expressions—inadvertent, no doubt—to the effect that the plaintiff's

declaration must show that he asserts a right under the Constitution or some law of the United States,—as if only such suits were suits arising under the U. S. Constitution or laws. But this is directly opposed to the cases already cited and others that will be cited.

If such a requirement were essential to jurisdiction, one whose property was wrongfully seized by a United States marshal or revenue collector, or whose property was taken or his person or property injured by a federal railway corporation, could have no redress in the federal courts. His right of property or of personal security is not derived from the United States Constitution or laws, and when he asserts either in a declaration he is not asserting a right under the United States Constitution or laws.

For trespass against a marshal, see

Bock v. Perkins, 139 U. S. 628.

Sonnentheil v. Brewing Co., 172 U. S. 401.

And compare

Walker v Collins, 167 U. S. 57.

Against an internal revenue collector, see

Venable v. Richards, 105 U. S. 636.

Harding v. Woodcock, 137 U. S. 43.

[And these are all instances where the same federal question might be raised by justification in the answer or by the same matter stated—and properly stated—in the declaration, as suggested above.]

And the books are full of cases against collectors of customs, and actions of tort against federal railway companies, brought in the circuit courts.

In *Tennessee* v. *Davis*, 100 U. S. 257, (a removed case, already cited) Mr. Justice Strong says, (p. 264):

> "What constitutes a case thus arising was early defined in the case cited from 6 Wheaton. It is not merely one where a party comes into court to demand something conferred on him by the Constitution or by a law or a treaty."

And he goes on to quote from Osborn v. Bank of U. S. and Cohens v. Virginia.

In *Osborn* v. *Bank of United States*, the suit was brought by the bank to enjoin collection of a tax, the bank asserting its rights under its charter. If suits asserting rights claimed to have been conferred on the plaintiff by the federal Constitution or laws were the *only* suits arising under the Constitution and laws, the Chief Justice could not have failed to limit his description accordingly.

On the contrary, he adopted the broader description, so often repeated by this Court of cases arising under the Constitution and laws, and expressly includes the bank's case *within* it, saying: "the case of the bank is, we think, a very strong case *of this description*." (9 Wheat. 823.)

That is, a case of rights claimed under act of Congress, if within the jurisdiction, is so when and because it presents a federal question.

And in *Swafford* v. *Templeton*, 185 U. S. 487, 494, Mr. Justice White distinguishes between two sorts of cases equally within the jurisdiction of the circuit courts, viz: (1) "Controversies concerning rights which are created by the Constitution or laws

of the United States, and which consequently are in their essence federal," and (2) "Controversies concerning rights not conferred by the Constitution or laws of the United States, the contention respecting which may or may not involve a federal question, depending on what is the real issue to be decided or the substantiality of the averments as to the existence of the rights which it is claimed are federal in character."

This is conclusive as to the jurisdiction over the second as over the first class of cases.

And the existence of a federal question has been considered more important than a right asserted under an act of Congress, and such assertion of right held insufficient when the case did not involve a substantial controversy as to the construction or effect of the Constitution or laws of the United States—that is a substantial federal question.

Western Union Tel. Co. v. Ann Arbor R. Co.,
178 U. S. 239, 243-4

SECOND.

This suit arises under the Constitution and laws of the United States because of the federal questions presented by the bill.

(1) Upon the State statutes, whether, in their application to the facts alleged in the bill, they regulate interstate commerce, and, if so, whether the regulation is such as the State is authorized to make by the Federal Constitution.

(2) Upon the State's assertion of right and claim of relief under the Federal Constitution and laws, especially the Federal Anti trust Act.

(3) Upon the State's assertion of right and claim of relief under the Swamp-land granting acts of Congress.

I.

The Averments of the Bill which present the federal questions.

In paragraphs II, III and IV (8a-17a) the bill describes the lines of the two defendant railway companies on which they carry on interstate commerce in competition between St. Paul and Puget Sound.

In paragraph X, (22a-24a) the bill sets forth two laws of the State, forbidding a railway to consolidate with, or own the stock of, or control, a parallel or competing line; and also an act prohibiting and declaring unlawful, and making criminal all contracts, combinations, etc., in restraint of domestic or interstate trade or commerce.

In paragraph XI (25a) it charges a conspiracy to form the Securities Co. solely as an instrumentality by which the stock, property and franchises of the two railways should be consolidated in fact, and the fixing of rates "over any and all the lines of railway of each of said companies, as well within as without the State of Minnesota, should be vested in and controlled by said Securities Co., and all compe-

tition in freight and passenger traffic between said two systems, as well within as without the State of Minnesota, be suppressed"—all with the intention to evade and violate the State anti-consolidation laws, and the statute "prohibiting all combinations in restraint of trade or commerce within this State, and restraint of trade and commerce between the people of this State and the people of other states and countries."

Paragraphs XII—XIV (26a-32a) detail the acts done in carrying out the conspiracy.

Paragraph XV (32a-35a) states that the Securities Co. has acquired a great majority of the stock of each railway company, which was transferred to it by the conspirators named and their associates, with "the sole purpose, object and effect * * * to transfer to and vest in said Securities Co. the complete management and control of the respective lines of railway and railway properties of each of said railway companies within and without the State of Minnesota, and to place the complete management and control of the same and the power to dictate the policy of each of said companies, as well as the power and authority to fix rates and charges for the transportation of both freight and passengers within the State of Minnesota as well as without said State, in the hands of and under the control of one party or board of directors."

Paragraph XVIII (36a) states that the scheme for consolidation and control has been consummated, and

"Said two railway systems are now under the

absolute management and control of the defendant the Northern Securities Co., its directors and officers, and by reason thereof all competition between said lines has been destroyed, and a monopoly in railway traffic in Minnesota as well as without said state has been created, to the great and permanent and irreparable damage of the State of Minnesota and the people thereof and in violation of its laws and of the laws of the United States in such case made and provided, viz.: The act of Congress approved July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies.'"

The relief asked is

1. That the acts complained of be decreed to be "in violation of the laws of this State and of the United States."

2. That the Securities Co. be enjoined from acquiring, holding, voting or in any way acting as owner of any shares of either railway company, or controlling in any way their management or operations.

3. That the Northern Pacific Co. be enjoined from recognizing the Securities Co. as a shareholder or paying it any dividends, or from making any combination with the Great Northern Co. that will in any way disturb its independent integrity, management and control, and "from entering into any agreements directly or indirectly destroying free and unlimited competition between said defendant and said Great Northern Co. by interchange of traffic, poolings of earnings, or division of profits or otherwise."

4 and 5. That a like injunction be decreed against the Great Northern Co.

6. For injunction against Mr. Hill.

7. The general prayer for other and further relief.

The bill also contains the following averments of the injury done to plaintiff as a property owner and shipper by the matters complained of, for, like the United States in the *Debs Case*, (158 U. S. 564, 583-4) the plaintiff sues in those capacities as well as a sovereign.

In paragraph V (18a) it alleges the plaintiff's ownership of 3 million acres of swamp lands worth $15,000,000, located in the territory traversed by the lines of defendants' railways, and the value and salability of which depend on open and unrestricted competition between the defendant railway companies; that under the consolidation and unity of control hereinafter set forth there will be an end of the rivalry heretofore existing between the companies, and a cessation of the building of spur lines to or near such lands, which lines are necessary to their salability and have heretofore, by reason of the rivalry of said corporations, been built; and that because of such cessation many of such lands will not be reached by railroads for many years to come.

In paragraph VI (19a) it alleges that the plaintiff owns and maintains a university, five normal schools, and a large number of hospitals for the insane, schools for the deaf, dumb, blind and feeble

minded, etc., and proceeds:

> "That for many years past the State of Minnesota has continuously maintained and supported each of said institutions, and in the care, maintenance and management thereof has been compelled to, and in the future of necessity, will annually purchase large quantities of supplies for said institutions, including provisions, clothing and fuel, a great portion of which the State of Minnesota is compelled to ship over the different lines of railway owned and operated by the Northern Pacific Co. and the Great Northern Co."

Shipments over "the different lines of railway" of the two companies, include interstate as well as wholly domestic shipments, the bill not distinguishing between the two.

It is to the State's interest as a property-owner and shipper that must be referred the averment in paragraph XVIII, quoted *supra*, that the alleged "monopoly in railway traffic in Minnesota as well as without said state" (i. e. interstate traffic) "has been created, to the great and irreparable damage of the State of Minnesota, * * * in violation of * * * the Act of Congress, approved July 2, 1890."

That these paragraphs V and VI (and especially the latter) were inserted to sustain a claim by the State as land-owner and shipper under the Anti-trust Act of Congress, is evident on their face, and that such was the purpose of the pleader is evident from this:

In the original bill attempted to be filed by the State in this Court two years ago, paragraphs V and

VI of the present bill appear as paragraphs III. A and B.

In the Brief of the State in support of its motion for leave to file that bill, it is said (page 6):

> "The proprietary interest under which the State of Minnesota claims the right to maintain this action is set forth in said bill of complaint in paragraphs III and IV."

And see further on pages 6 and 7.

And at the top of page 6 of the same brief, after a statement of what is charged in the bill, is a manuscript insertion, apparently in the handwriting of the Attorney General, of the following claim, being the same made in print in paragraph XVIII of the present bill: "It is also claimed this is a violation of the Federal Anti-trust Act."

II.

The bill presents federal questions both in its aspect of a bill by the State as a sovereign to enforce its local statutes, and as a landowner and shipper for relief under those statutes. And these questions are the same whether the State sues as sovereign or as property-owner and shipper or in both of these capacities.

It appears by the bill that each of the defendant railways traverses several states, and carries on interstate as well as domestic commerce, and competes with the other for both classes of commerce.

It also appears that the Securities Co. has bought a large majority of the stock of both companies.

It is also alleged that such purchase places the control of both companies in the Securities Co., and *ipso facto* restrains both their state and interstate commerce by suppressing all competition between them, and creates a monopoly of both kinds of commerce.

The State assails this as a violation of its anti-consolidation laws and its law forbidding combinations in restraint of interstate as well as domestic commerce.

It is evident that if this stock-purchase and holding restrains commerce at all, it restrains both state and interstate commerce. And that any state law regulating it regulates both kinds of commerce if it regulates either.

And so the questions are:

1. Is the matter of stock holding in competing railway companies engaged in interstate commerce, in itself a matter of interstate commerce?

2. If it be a matter of interstate commerce, is it a matter for exclusive regulation by Congress, or may the State regulate it in the absence of regulation by Congress?

3. If it be a matter of interstate commerce, but one which the State may regulate until action by Congress, has Congress regulated it by the Anti-trust Act of July 2, 1890?

These questions are certainly presented by the bill, and as certainly they are federal questions. They involve the construction of the Constitution and laws of the United States, and will receive a different answer and the cause a different decision according to the construction given to the Constitution and laws.

The questions stated above show that the bill is not open to an objection that has been made in one case, at least, that the plaintiff claims *against* the Constitution. On the contrary, on one construction of the commerce clause, the state statutes are in accord with the Constitution, and plaintiff is not required to and presumably will not contend for the opposite construction.

In nearly every case where a plaintiff asserts a right as founded on the Constitution or a law, his

claim, while under them on one construction, is against them on an opposite or different construction, yet his suit is none the less a suit arising under the Constitution and laws.

If, then, we are right as to what constitutes a suit arising under the Constitution and laws of the United States,—if what has over and over again been declared to be law from Osborn v. Bank of U. S., in 1824, to Patton v. Brady and Swafford v. Templeton, in 1902, is still the law,—the bill of the plaintiff, presenting as it does federal questions, would be sufficient as an original bill, the basis of a suit begun by original process, in the circuit court. The jurisdiction would attach on the filing of the bill, and would not require or be helped by an answer or demurrer relying on the unconstitutionality of the state laws. That would add no new fact to those stated in the bill, and jurisdiction depends on the facts alleged.

The bill, being sufficient to show jurisdiction in a suit brought originally in the circuit court, must necessarily be sufficient to show jurisdiction in a removed suit.

The following cases are closely analogous to, and some of them on all fours with, the present.

State of South Carolina v. Coosaw Mining Co., (1891) 45 Fed. 804, was brought in a State court. The complaint simply alleged the State's ownership of the bed of the Coosaw river and the phosphate deposits there, and that the defendant claimed an exclusive right of mining

there, which plaintiff denies; but that notwithstanding such a denial the defendant obstructs the relators, who are the state board of phosphate commissioners (p. 805); that defendants' claim is based on a specified act of the State legislature, which the relators say is invalid (p. 806); that the defendant has brought suit against the State's licensees and threatens others, and this cloud on the State's title should be removed (p. 805).

The defendant removed the case to the circuit court as arising under the U. S. Constitution, the statute under which the relators were acting being alleged to be in derogation of defendant's grant.

On motion to remand the court considers the case under two aspects: (1) on the complaint alone, (2) on the complaint and petition for removal. On each aspect the court holds that the suit arises under the Constitution.

To arrive at this conclusion on the complaint alone, the court takes judicial notice of two public laws of the State, one making a grant claimed to be exclusive to defendant, the other the act of 1890, (pleaded by its title in the bill), under which the suit is brought, and which is in derogation of the rights granted by the former.

Reading these statutes into the complaint, the court holds that it presents a federal question under the contract clause of the Constitution, and that the suit is removable. On a second application the decision of Judge Simonton was affirmed by Chief Justice Fuller (47 Fed. 225) whose final decree was affirmed in 144 U. S. 550, this Court, in its state-

ment of the case, referring to the proceedings in 45 and 47 Fed., where the jurisdictional question was raised and determined. In view of the scrutiny always—particularly since the amendment of 1887-8—given by this Court to the record to discover flaws in the jurisdiction especially in cases removed on this ground, this affirmance amounts to a direct decision in favor of the jurisdiction.

In this case, thus affirmed, Simonton, J., says. (45 Fed. 809):

> "Thus there are present before the court with this complaint two acts of the legislature of South Carolina. One of them, say the defendants, creates a contract between them and the state, giving them certain exclusive rights in state territory. The other creates the board which the relators claim to be; by its several provisions seeks to clothe them with powers impairing these contract rights of defendants; and by its general repealing clause seeks to destroy them altogether. Thus there is made in this way, going no farther than the complaint and the acts which in contemplation of law accompany and illustrate it, an issue which raises a federal question, and would be proper for the jurisdiction of this court."

This case is cited with approval in Re Debs, 158 U. S. 564.

Whether the court was right in thus importing into the complaint a State statute not pleaded (and the affirmance would indicate that this Court considered that it was), does not affect the applicability or the authority of the case on the question now under discussion. Here the statutes are set forth at large.

In *Ames v. Kansas*, (1884) 111 U. S. 449, the State brought *quo warranto* in one of its own courts, against one of its own railway companies, the Kansas Pacific Co., and a like proceeding against its stockholders, alleging that the company had unlawfully and in violation of its charter attempted to consolidate with the Union Pacific R. Co., a pretended corporation, created, if at all, by act of Congress, (describing its route), owing no duty to Kansas and amenable only to federal control. The petition set forth the Kansas acts of 1855 and 1857 forming the company's charter, its organizaton thereunder, and the Pacific railroad acts of Congress of July 1, 1862, and July 2, 1864 (p. 453), section 16 of the former act (p. 450) being that under which the consolidation was made. It also set forth a copy of the articles, from which it appeared that the sole and only authority relied on for the consolidation was that contained in those acts of Congress (p. 454).

Other charges were made, among them that the roads were competing lines and did not connect at the state line, so as to form a continuous line of railway. And all these were relied on as grounds for forfeiture of the company's charter.

The defendants, in their answers, set up and relied on the same acts of Congress stated in the bill, and then filed their petitions for removal to the circuit court, by which the case was on motion remanded.

The cases were held properly removed, because "the whole purpose of the suits was to test the validity of the consolidation. The charge is of an unlawful and wrongful consolidation, and from the begin-

ing to the end of the petition against the Kansas Pacific Co. there is not an allegation of default that does not grow out of this single act" (p. 462). * * * "That the validity of the consolidation, so far as the State is concerned, rests alone on the authority conferred for that purpose by the acts of Congress, is not denied. If the acts of Congress confer the authority, the consolidation is valid, if not, it is invalid. Clearly, therefore, the cases arise under these acts of Congress."

The Court then proceeds to consider whether a suit of this kind between a State and one of its own corporations can be removed to the circuit court when it presents a federal question, and the decision is that it can.

It will be noted that the case was removed after answer, but it will be noted that the answer merely set up the acts of Congress already pleaded in the bill, and presented no new federal questions. In this respect the case is not unlike *Harding v. Woodcock*, 137 U. S. 43, cited *supra*, and suits against U. S. marshals as such, where the same matter may be averred in the declaration and thus show jurisdiction, and also averred in the answer as part of the defence.

Hence if the bill and answer together showed a federal question (and the Court held that it did, and that the case was removable on that ground) the bill of itself showed the same question and so would have sustained an original suit in the circuit court.

It will also be noted that the State *claimed nothing under any act of Congress, but the contrary.*

Also that this was a controversy between the State and one of its own corporations, based on its own anti-consolidation law. And see *Southern Pacific R. Co. v. California*, 118 U. S. 109. 111-3, and cases cited.

In *State of South Carolina v. Port Royal &c. Ry. Co.*, (1893) 56 Fed. 333, the State filed a bill in its own court against defendant, (a corporation of its own creation), alleging that a majority of defendant's shares had been acquired by the Central R. Co. of Georgia, which had no power under the laws of that State to hold such shares, and which acquisition was also in violation of the laws of South Carolina, the lines of the two companies being parallel and competing, and was made to cripple the traffic of defendant and create a monopoly.

The bill states at length the lines which the Georgia Company operates, as to which the court says (p. 335): "It may be noted, by the way, that this means largely engaged in interstate commerce," (and see p. 337 at top), so that the bill shows on its face that it was brought to defeat a purchase and holding of stock in a competing line by a company engaged in interstate commerce.

That is, the bill asserts a right by the State to prevent such stockholding though the holder is engaged in interstate commerce, and, of course, that the right of the state to prohibit such purchase does not conflict with the commerce clause of the Constitution or any valid legislation of Congress thereunder.

The defendant's petition for removal asserts the

right of the buyer to purchase and hold the stock under the commerce clause and the interstate-commerce law, free from interference by the State. Under the cases cited and referred to *supra* in our observations on Ames v. Kansas, this statement of the petition would seem to add nothing to the case for jurisdiction made by the bill. It presents the same federal question already presented by the bill.

The Court (Simonton, J.) held the case properly removed because of the federal question under the commerce clause of the Constitution.

This case is quite analogous to the present, although here the complaint in this case presents the federal question yet more clearly and distinctly.

People v Rock Island &c. Ry. Co., 71 Fed. 753, was a petition in a State court of Illinois to compel the railway company to run its passenger trains to its original (but abandoned) station in Rock Island, the relator claiming such to be the requirement of a general statute of Illinois. The prayer was not limited to trains running wholly within the state. Defendant's petition for removal showed that the company was engaged in interstate commerce, running trains through Rock Island into Iowa, and that the requirement creates a serious burden on interstate commerce. In denying a motion to remand, Grosscup, J., said:

> P. 755. "On the motion to remand my sole duty is to ascertain if any such defense can probably and fairly be interposed."
>
> P. 757. "I have already said enough to show that in my judgment it is at least a subject of

> fair dispute whether the attempted regulation be not a burden on interstate commerce. That conclusion settles the fate of the motion under consideration. When such a question fairly arises, either in the right invoked by the plaintiff or the defence interposed by the defendant, there exists a case arising under the Constitution and laws of the United States which either party has a right to bring into the federal court."

The court doubtless erred in considering the petition for removal. But if the relator's petition had stated that the railway company's trains which he desired to have stop at the old Rock Island station included interstate trains, the same federal question would have been presented which was presented by the complaint and petition.

In the present case the complaint itself contains all the elements of a federal question which in the case just stated were contained a part in the plaintiff's pleading and a part in defendant's petition.

In *State of Minnesota v. Duluth & Iron Range R. Co.*, (1898) 87 Fed. 497, the plaintiff sued in one of its own courts alleging various acts of its legislature granting swamp lands to defendant to aid in building its railway; the construction and completion of the railway, and conveyance to the company by the governor of a large amount of lands selected under the grant; various dispositions made of such lands by the company by sale or mortgage; and also an act of the legislature of April 21, 1897, purporting to repeal all prior acts granting lands to defendant, and to forfeit and resume all the lands so granted.

The defendant removed the cause to the circuit court, where a motion to remand was denied by Lochren, J., on grounds thus stated:

> "It appears to be settled that, to sustain the jurisdiction of this court, it must appear by the plaintiff's statement of the facts on which his claims depend, that the suit is one arising under the constitution or laws of the United States. The case of Tennessee v. Union & Planters' Bank, 152 U. S. 454, has been followed upon this point. In that case (at page 460) the decision in Starin v. City of New York, 115 U. S. 248, approved in Carson v. Dunham, 121 U. S. 427, that 'the suit must be one in which some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law or treaty of the United States, or sustained by a contrary construction,' was referred to as equally applicable to the act of March 3 1887, as amended by the act of August 13, 1888, as to the prior act of 1875. In other words, to give the United States circuit court jurisdiction, it is not necessary that it should appear that plaintiff's right to recover is based upon and supported by some provision of the Constitution or statutes of the United States. A federal question is equally presented if it appears from plaintiff's statement of facts that a construction, which may be fairly claimed and contended for, of a provision of such Constitution or statutes, would defeat plaintiff's right of recovery. The complainant's right of recovery here depends upon the validity of the legislative act of April 21, 1897, when tested by the provisions of section 10 of article 1 of the Constitution of the United States, and section 1 of article 14 of the amendments to that Constitution. Every fact upon which the solution of this federal question depends is stated on the face of the complaint, and apparently the question can be

presented by a demurrer to the bill of complaint. The motion to remand is denied."

The case of *Tennessee v. Union Bank*, 152 U. S. 454, has been by some supposed to overrule the construction of the Constitution on which we rely, and to decide that a suit does not arise under the Constitution or laws, although it presents a federal question on which its determination depends; but that a suit so arises only when the plaintiff asserts a right under the Constitution or laws of the United States, and such assertion is shown by his declaration or bill.

It is settled that a plaintiff bringing an original suit, must show "at the outset" (and hence in his bill or declaration) that the circuit court has jurisdiction—that is, must show that the suit arises under the Constitution or laws. And he must show this by the statement of his own "claim"—that is, his own case or cause of action. He cannot make a case for jurisdiction by alleging matters purely of defence.

In *Tennessee v. Union Bank*, the original suits, two in number, were brought to enforce payment of taxes under a general law.

In each suit the plaintiff's "claim" consisted (1) of its right, arising from the imposition of taxes by the statute, the assessment and levy of such taxes, and demand of payment after due, if required by the statute, and (2) of the violation of its right by the refusal or neglect of defendant to pay.

The violation of a plaintiff's right is as much a

part of his "claim" or cause of action as the right itself.

It is plain that the statement of such a claim as that of the State raised no federal question; and it is also plain that the averments as to defendant's claim had no place in the bill and could not be considered on the question of jurisdiction. The decision was necessarily against the jurisdiction.

But after quoting from *Carson v. Dunham*, 121 U. S. 421, 427, and from *Metcalf v. Watertown*, language declaring that the test of a suit arising under the Constitution and laws is that for which we contend, the presentation of a federal question—(Mr. Justice Harlan in the latter case speaks of an original suit being properly brought in the Circuit court "upon the *sole* ground that the determination of the suit depends on some question of a federal nature.") —Mr. Justice Gray says:

> "It is *therefore* essential to jurisdiction that the plaintiff's declaration or bill should show that he *asserts a right* under the Constitution or laws of the United States."

If these words are to be taken literally, Mr. Justice Gray, while professing to follow the decisions which he quotes and to deduce this ruling from the quoted passages, directly overrules them—and not only overrules them, but overrules a long line of decisions by which the overruled construction seemed as firmly established as if written in the Constitution itself—and all this by a direct deduction, without any intermediate reasoning, from the very de-

cisions quoted, which are thus, in the same sentence, followed and overruled.

We are not prepared to believe that Mr. Justice Gray had any such purpose, or that there was not some inadvertence or perhaps some omission. Indeed we find language in his opinion in *Chappell v. Waterworth*, 155 U. S. 102, intimating that in ejectment against the keeper of a United States light-house, an averment in the declaration that such was the nature of defendant's holding, would give jurisdiction, though plaintiff asserted no claim under the United States Constitution or laws; for he says that the declaration is insufficient to show that the suit arose under the Constitution or laws, because "it does not show that *either* party claims any right under the Constitution or laws of the United States."

And while the whole court concurred in the decision of the first two cases in *Tennessee v. Union Bank*, that the complaint did not show jurisdiction, we submit that the Justices must be taken to have concurred and to have in fact concurred, on the authority of the cases cited and quoted, and on the grounds therein stated, and not to have concurred in a decision intended to overrule them. Only thus can the case be reconciled with those preceding and following it.

While Congress may not give the circuit courts jurisdiction beyond the constitutional grant, it may give them as much less as it sees fit. And if it intended to reduce the original jurisdiction of the circuit courts as it had confessedly existed under the

act of 1875 to the narrow limits against which we contend, it would not have reenacted the same grant of jurisdiction as in the act of 1875. Instead of "*all* civil suits, arising," etc., the act would have read, "all civil suits in which the plaintiff in his declaration or bill, asserts a right under the Constitution," etc., or words to that effect.

The following test of the ruling under discussion would seem to demonstrate its unsoundness.

It is conceded that wherever jurisdiction depends on the character of the suit, whoever invokes the jurisdiction must do so upon a record showing jurisdiction.

Under this rule, the plaintiff in an original suit must, when he invokes the jurisdiction, do so upon a declaration or bill (for at that time his pleading is the only record) showing that the suit arises under the Constitution or laws, etc.

Therefore, says the opinion he must assert in his pleading a right under the Constitution or a law.

But this last conclusion is sound only upon the assumption that the only suit arising under the Constitution or laws is a suit in which the plaintiff asserts a right under the Constitution or laws.

But the whole class of cases removed under the act of 1875, where the plaintiff claimed nothing under the Constitution or laws, and the federal question was raised by defendant, refute the assumption. These suits were within the jurisdiction of the circuit court, and were so because and only because arising under the Constitution or laws.

It may be suggested that a defendant, asserting in his answer a right under the Constitution or laws, and then removing the case, stands in the circuit court, in respect of jurisdiction, on the footing of a plaintiff, since it is he who brings the case to the court for its cognizance and invokes the jurisdiction; and therefore that this satisfies the requirements that *plaintiff* must assert a right under the Constitution, etc., and must do so in his bill or declaration.

The suggestion seems reasonable. But take this case, under the act of 1875:

Plaintiff sues in a state court on a promissory note. Defendant pleads a discharge in bankruptcy. Immediately after this answer the *plaintiff* removes the case.

Here the plaintiff asserts no right under the Constitution, etc., and the party invoking the jurisdiction of the circuit court (also the plaintiff) asserts no such right.

But the circuit court would certainly have had jurisdiction of such a suit as one arising, etc. This being so, it follows that the suits in which the plaintiff asserts a right under the Constitution or laws are not the only suits arising under the Constitution or laws of the United States,—which is what we have essayed to prove.

And as it is not true that every person—not true that a plaintiff in *all* cases—bringing a suit to the circuit court for its cognizance, must assert at that time on the record a right under the Constitution or laws, what ground is there for holding that the plaintiff in an original suit must do so in his bill or declaration?

THIRD.

The cause was properly removed because of the plaintiff's assertion of right and claim of relief under the Constitution and laws of the United States.

(1)

Besides the claims of the state under the full-faith-and-credit clause of Article IV of the Constitution, which has been orally argued by its counsel before the Court, and its claim under the swamp-land granting acts of Congress, which are a subject of argument in our brief already filed, (pages 32-35,) the State asserts a right as a property-owner and as engaged in interstate commerce to carry on that commerce free from obstruction by combinations in restraint of commerce or by monopolies of such commerce—substantially the same right as that asserted by the United States in the *Debs Case*, 158 U. S. 564, 583-4.

That a citizen's right to carry on interstate commerce is a constitutional right is declared by this Court in

Crutcher v. Kentucky, 141 U. S. 47, 57.

Reid v. Colorado, 187 U. S. 137.

And there can be no doubt that a State has the same right as a citizen.

The bill directly asserts this right and charges a violation of it by the acts of the combination alleged in the bill. It also charges that such acts are in vio-

lation of the Federal Anti-trust Act, which is specially directed against violation of such rights by combinations in restraint of commerce.

The bill plainly asserts a right under the Constitution as well as under the Anti-trust Act, and this gives jurisdiction. Whether the bill sufficiently alleges continuous or threatened injury to that right to make a case for the relief prayed or for any equitable relief is not a question of jurisdiction, but a question for the court to decide in the exercise of jurisdiction.

Swafford v. Templeton, 185 U. S. 487, 493-4.
Southern Pacific R. Co. v. California, 118 U. S. 112-113.
Hax v. Caspar, 31 Fed. 499, 501.
Lowry v. Chicago, B. & Q. R. Co., 46 Fed. 83, 85.

And while the mere assertion of a right which it is perfectly plain is not given, or which this court has definitely settled is not given by the Constitution or a law will not sustain the jurisdiction, yet if it is a fair question for argument whether the right asserted is given by the Constitution or a law, this is sufficient for jurisdiction, even though the Court, in the exercise of its jurisdiction to hear and determine the cause, should decide against the existence of the right. In this case the assertion of a right under the Constitution to carry on interstate commerce is certainly justified by the decisions of this court just cited, and is therefore sufficient as a foundation for jurisdiction.

This being so, then before the Anti-trust Act,

one asserting such a right could have sued in the circuit court at law or in equity, for damages already sustained from its violation or for an injunction to prevent future wrongs or a continuance of existing wrongs, and this whether the injury complained of was done or threatened by an individual or a combination of individuals.

(2)

This right of such a plaintiff to sue—the jurisdiction of the circuit court to entertain the suit—is not impaired or taken away by the Anti-trust Act. So far as the right asserted by plaintiff in this suit is concerned, the Anti-trust Act did not create it, although recognizing it in so far as it is a right to be protected against conspiracies and combinations. The act gives no new jurisdiction of subject-matter to the circuit courts so far as concerns individuals or suits by them to protect their property rights. It gives a probably new jurisdiction of suits by the United States not to enforce or protect property rights, but to prevent violations of the act as such, as crimes.

The right asserted being such that its assertion in the bill would have been sufficient for jurisdiction of an original suit to redress or prevent violations of it by an individual or a combination before the Anti-trust Act, the question is not has that act conferred jurisdiction of such suits, (that act is concerned only with combinations, etc., and the wrongs done by them, not with wrongs done by individuals,) but has it, while expressly declaring the right taken

away the already existing remedy in equity against combinations?

Hardly anything less than express words to that effect will, in such case, be construed to take away jurisdiction. The court does not lose its jurisdiction by implication. Whatever new jurisdiction or new remedies are given by the act must be taken as cumulative and not as exclusive or by way of substitution. And it is unreasonable to suppose that Congress meant to take away the existing remedy in equity against combinations, while leaving it against individuals.

Even if the right asserted by plaintiff were held to be created by and exist under the Anti-trust law alone, and even if that act created a new jurisdiction or gave new remedies for the right in favor of individuals, this would not preclude this suit in equity by plaintiff, though in that case the suit would be wholly under the act, while it now is under both the Constitution and the act to enforce a right created by the former and reaffirmed by the latter.

The rule that when a statute creates a right and also provides a remedy at law, the statutory remedy is exclusive, excludes only remedies at law and does not oust the court of its equitable jurisdiction. In such cases the court possesses the same jurisdiction to entertain suits in equity and to administer equitable relief as if the right thus created by statute had owed its existence to the common law, and on the same grounds.

This is so well settled that it will be enough to cite two instances.

At common law it was not an actionable wrong—and so not a legal wrong at all—for a tenant by demise or lease for life or for years to commit waste. In committing it he violated no legal rights of the owner (in the absence of provision against it in the lease).

The statute of Marlebridge, 52 Henry III, c. 24, (A. D. 1267) gave the owner a special action for his damages, against such tenant for waste committed by him, and the statute of Gloucester, 6 Edw. I, c. 5 (A. D. 1278) gave a recovery of the place wasted and treble damages—(just as the Anti-trust law gives treble damages).

Coke, 2d Inst., 144, 299.

Since the reign of Richard II, injunctions against such tenants to stay waste have been continually granted. There is no better recognized head of equity jurisdiction—in spite of the fact that a special remedy at law was given by the statute creating the right.

The English copyright act of 1842 (5 & 6 Vict., c. 45) gave to authors, etc., a copyright, (not known to the common law, *Donaldson v. Beckett*, 4 Burr. 2408; and see *Wheaton v. Peters*, 8 Pet. 591), and in section 17 prohibited the importation or sale of pirated copies, and provided for the seizure and forfeiture of such copies, and further that any person convicted of a violation of the prohibition should for each offence forfeit ten pounds and double the value of each copy; one-half the penalty to go to the owner of the copyright.

Here was a right created by statute and a specific remedy given by the same statute for its violation.

Plaintiff, owner of a copyright, sued for an injunction to restrain the sale of imported copies by defendant.

The cause was heard on bill and answer before one of the greatest of equity judges, Sir George Jessel, M. R.

In directing a decree for plaintiff he said on this point:

> "There was a point not insisted upon, but mentioned during the course of the argument. It was said that the 17th section of the Act created a new offence of importation and enacted a particular penalty, and it was argued that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty, and that nothing else could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which, if done, would be an offence. Wherever an act is illegal and is threatened the Court will interfere and prevent the act being done—and as regards the mode of granting an injunction, the Court will grant it either when the legal act is threatened but has not been actually done, or when it has been done and seemingly is intended to be repeated." *Cooper v. Whittingham*, 15 Ch. Div. 501, 506.

This decision was approved and followed so lately as the case of *Stevens v. Chown*, (1891) 1 Ch. 894, and, so far as we know, has never been questioned.

The circuit court in a case like this, upon acquiring jurisdiction of the cause by reason of the federal questions presented by the bill, (1) on the constitutionality of the state legislation, and (2) on the claim of rights under the Constitution and laws, has jurisdiction to decide, not only these federal questions, but every question, federal or non-federal, that may be presented by the bill or arise upon the other pleadings or the evidence. *Osborn v. Bank of United States, supra.*

And the court has jurisdiction to decide the cause on these non-federal grounds, without deciding or even considering the federal questions presented by the bill. And this is the proper course where the federal questions are constitutional questions. *Santa Clara Co. v. Southern Pacific R. R.*, 118 U. S. 394, 410-411, 416.

And its jurisdiction remains the same although the plaintiff should fail to establish by proofs the facts alleged as showing a right under the Constitution or laws or otherwise raising a federal question, for the jurisdiction is determined by the averments of the bill. *Southern Pacific R. Co. v. California*, 118 U. S. 109 112-3; *City Ry. Co. v. Citizens R. R. Co.*, 166 U. S. 537, 562.

And the fact that the federal questions may receive little or no attention in the argument in this Court, or even in the circuit court, does not affect the jurisdiction of either court. It may pass by the questions argued and decide the federal questions, just as, in *Santa Clara Co. v. Southern Pacific R.*

R., supra, this Court passed by the federal questions and decided the cause on non-federal grounds.

The validity of the removal should be affirmed.

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